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No. 06-562

APR05

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JAMES KOTROUS AS AMICUS CURIAE SUPPORTING RESPONDENT

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I. STATEMENT OF INTEREST

Amicus Curiae James Kotrous, individually and doing business as The Mattress Factory, (Kotrous)[1] urges this Court to uphold the United States Eighth Circuit Court of Appeals decision, *Atlantic Research Corp. v. United States,* 459 F.3d 827 (8th Cir. 2006) (*Atlantic Research*), in accordance with this Court's opinion in *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994) (*Key Tronic*), that potentially responsible parties are entitled to recover response costs from other potentially responsible parties, in the absence of a Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, (CERCLA) enforcement action or government settlement, through an implied right of contribution for the fair share of recovery costs under section 107 of CERCLA. Kotrous is a plaintiff in a CERCLA contribution case now pending interlocutory challenge, under seemingly identical allegations to those at issue in this Court, in the United States Ninth Circuit Court of Appeals, *James Kotrous v. Goss-Jewett Company of Northern California, Inc.,* No. 06-15162, consolidated with the already consolidated cases in *Goodrich Corporation v. County of San Bernadino,* Nos. 05-56694 and 05-56749 (hereafter referred to as "*Kotrous v. Goss-Jewett*"), *see* Exhibit A hereto.

As a California property owner enduring necessary litigation in the United States Eastern District Court of

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[1] This brief is submitted with the consent of the parties. Amicus Curiae James Kotrous affirms that this brief was drafted exclusively by his counsel of record and that Amicus Curiae James Kotrous provided all monetary contributions for the preparation of this brief.

California since 2002, Kotrous, an individual who unknowingly purchased contaminated property in October 1995, seeks to inform this Court's decision in this important case. The litigation commenced by Kotrous involves certain property located at 4301 Power Inn Road in Sacramento, California. From 1970 through 1996, the primary defendant in the litigation, Goss-Jewett Company of Northern California (Goss-Jewett), leased the subject property to engage in purchasing, storing onsite, and distributing chemicals (containing perchloreoethylene (PCE)) used in dry cleaning establishments. Goss-Jewett failed to cooperate with the state agency with jurisdiction over contaminated sites in Sacramento, the Central Valley Regional Water Quality Control Board (State). The State issued a cleanup and abatement order against Goss-Jewett and one of its officers responsible for the activities resulting in contamination, but the defendants did not comply.

In searching for responsible parties to come up with funding for the cleanup, the State then issued a new cleanup and abatement order, which also imposed direct cleanup responsibility on Kotrous and a former owner of the contaminated site at issue in the pending action before the Ninth Circuit. Soon after receiving the cleanup and abatement order, Kotrous initiated a CERCLA action to recover costs of the cleanup by way of contribution against other "potentially responsible parties" (PRPs), as authorized by CERCLA section 107(a) and by CERCLA section 113(f). *See* Exhibit B hereto. As similarly noted by the Eighth Circuit in *Atlantic Research*, Kotrous is by definition a "potentially responsible party" due to his mere ownership of the property; the application of this term and the ownership of property, however, does not alone signify that Kotrous is actually responsible for any activity that

resulted in the contamination of the property. *See Atlantic Research,* 459 U.S. at 831; *see also* 42 U.S.C. § 9607(a)(1) (defining any "owner and operator" of a contaminated property as liable for cleanup and response costs under CERCLA).

Since the issuance of this Court's decision in *Cooper Industries, Inc. v. Aviall Serv., Inc.,* 543 U.S. 157 (2004) (*Cooper*), the fate of numerous contaminated sites throughout the country (not the least of which is the property owned by Kotrous that is at issue in the pending Ninth Circuit challenges) has been highly uncertain. Appellants in *Kotrous v. Goss-Jewett* asserted *Cooper* to challenge the District Court's jurisdiction over Kotrous' section 107 and section 113 contribution actions. The District Court upheld Kotrous' standing to raise the CERCLA causes of action by ruling only on the section 107 contribution issue and asserting that CERCLA section 107 maintains an implied right to contribution for PRPs. Appellants successfully sought interlocutory review of the District Court's decision by the Ninth Circuit. Pending resolution at the Ninth Circuit, the District Court proceedings are stayed. Meanwhile, the contamination remains and efforts continue to try to remedy the contamination of Kotrous' property caused by others prior to Kotrous' ownership of the property. *See* Exhibit A hereto.

This Court's decision in the present case will inevitably direct the Ninth Circuit's decision in *Kotrous v. Goss-Jewett.* Appellants in *Kotrous v. Goss-Jewett* seek the Ninth Circuit to wipe out, in one quick sweep, five years of litigation initiated by Kotrous to clean up property contaminated from activities taking place prior to Kotrous'

ownership of the property.[2] Completely denying PRPs, like Kotrous, a right to contribution would inevitably result in similar denials to landowners throughout the country and would devastate progress of voluntary contaminated site cleanups.

Over all things, Kotrous respectfully requests this Court to bring certainty to the currently unsettled state of CERCLA contribution across the nation. Individuals whom currently own properties contaminated, by actions of others, and for one reason or another were not able to or did not avail themselves of "innocent landowner" exemptions when they purchased the property, as is the case with Kotrous, deserve a standard set of game rules. The game rules that parties applied for years were haltingly thrown out in 2004 with this Court's decision in *Cooper,* which unsettled many contribution actions already brought by PRPs under section 113 of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Superfund Amendments). Since that time, extensive time and resources have been devoted to post-*Cooper* litigation throughout the country as parties and lower courts grapple with the law and equities of completely closing the door to contribution actions of those PRPs who are not subject to a government enforcement action or settlement.

This Court's ruling herein will directly impact the ability and willingness of private parties to initiate a

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[2] The Eastern District Court of California did not rule on the issue of whether Kotrous qualifies to bring a claim for contribution under section 113. Thus, Kotrous has reserved and continues to reserve all rights to subsequently argue in the Eastern District Court of Appeal and/or the Ninth Circuit Court of Appeals that he has met the standing requirements under section 113.

CERCLA action to recover cleanup costs from other PRPs. Moreover, resolution of the issues raised in this case, together with the *Cooper* ruling, will greatly influence whether private parties will continue to voluntarily remediate contaminated sites. Kotrous respectfully urges this Court to unambiguously uphold the right of PRPs to commence CERCLA litigation for contribution of recovery costs from other PRPs, pursuant to CERCLA section 107, so that individuals like Kotrous across the nation can move forward in cleaning up contaminated sites before commencement of government enforcement proceedings.

II. ARGUMENT

A. Public Policy Demands That Owners Of Contaminated Sites Have The Right To Recover Cleanup Costs Under Section 107 Against "Any Other Person"

Stepping away from the semantics of CERCLA section 107 and Superfund amendments section 113(f), Kotrous respectfully urges this Court to carefully consider the major policy ramifications of prohibiting a landowner, such as Kotrous, from proactively initiating CERCLA litigation against parties that were involved in activities resulting in contamination at the site to facilitate remediation of their property. Kotrous purchased property subject to contamination and subsequently sought to undergo the expense and burden of litigation to ensure that all responsible actors would contribute to the cost of cleanup. In Kotrous' case, the State pursued an administrative enforcement action against Kotrous because it could not compel the responsible parties, whom are no longer affiliated with the contaminated site, to comply with its administrative enforcement attempts. The State chose not to take on the

expense and staff drain of litigation and rather pursued administrative efforts with the current owners and lessees on the property. Kotrous filed suit in an attempt to force the responsible parties to contribute to the cleanup costs. In similar cases, landowners initiate voluntary cleanups of contaminated sites, without the nudge of an enforcement action, and initiate CERCLA litigation to compel contribution from the liable parties. *See* Exhibit B.

As found by the Eighth Circuit, in either situation, CERCLA's purposes would be frustrated by a complete denial of federal jurisdiction over claims brought under the comprehensive federal law directed at cleaning up contaminated sites. *See Atlantic Research,* 459 F.3d at 830-831; *see also Dico, Inc. v. Diamond,* 35 F.3d 348, 349 (8th Cir. 1994) (CERCLA was enacted to remedy the serious environmental health risks posed by industrial pollution by "ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties"). For this reason, the courts appropriately recognize an implied right of any party, including the owners and operators of a contaminated site, to seek contribution from other responsible parties under section 107(a). *Syms v. Olin Corp.,* 408 F.3d at 107 n.8 (2nd Cir. 2005) (*Syms*); *Key Tronic,* 511 U.S. at 816-817; *see also Pinal Creek Group v. Newmont Mining Corp,* 118 F.3d 1298 (9th Cir. 1997) (*Pinal Creek*).

Those on the other side of this issue contend that contribution actions of PRPs brought under section 107 prior to initiation of civil action by the government must be denied. However, as stated by the Ninth Circuit:

> [R]equiring a [section] 106 or [section] 107(a) action to be brought before a contribution action is allowed, would diminish the incentive of a PRP

> to remove hazardous substances voluntarily and reach a settlement with government agencies as to liability. That contribution may be sought after settlements as well as judgments is a well-established legal tradition. Suppose, for example, that after a car accident, the driver of each car is liable to an injured person. If one driver settles with the victim, he then can sue the other driver for contribution. It does not matter, for settlements or judgments, whether contribution is sought in the original or in a separate action.

Western Properties Serv. Corp. v. Shell Oil Co., 358 F.3d 678, 684 (9th Cir. 2004).

Thus, the comprehensive framework of CERCLA and the Superfund amendments simply cannot be read to omit *any* right of contribution for PRPs to initiate cleanup of contaminated sites. *See Syms*, 408 F.3d at 107, n.8. Such a result negates all progress and discourages proactive efforts to quickly initiate the cleanup (whether by voluntary efforts of private parties or state administrative orders), and subsequently seek cost recovery from all liable parties. *See Syms*, 408 F.3d 95. Denying PRPs the right to seek contribution under section 107 discourages "PRPs from voluntarily initiating cleanup, contrary to CERCLA's stated purpose of 'induc[ing] such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.'" *Id.* at 106 (citing H.R. Rep. No. 96-1016(I), at 17 (1980)). The absence of any avenue for PRPs to recover costs of cleanup before the government initiates a CERCLA action for a given contaminated site undermines CERCLA's primary goal of "encourag[ing] private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic*, 511 U.S. at 819.

Petitioner requests this Court to require owners of contaminated sites to sit back and wait for the government to pursue cleanup of the site. In so requesting, Petitioner actually seeks to dissolve any ability of a given landowner to "settle" with other responsible parties who have yet to be held accountable for the contamination by state or federal government agencies. Until someone brings a section 106 or 107 action to cleanup the contaminated site, there is simply no incentive for uncooperative responsible parties no longer connected to the site to come out from their respective hiding places and jump into a settlement agreement. The remote chance that the government will not pursue such an action in the foreseeable future is a sufficient disincentive to voluntarily entering a settlement. Where the State and landowner combined do not have sufficient funds to effectively clean up the site, the success of the cleanup hinges on litigation to pursue contribution from the uncooperative responsible parties. As evinced in the Kotrous situation, even an administrative enforcement action against past owners or operators of the site is insufficient to compel settlement or even compliance. *See* Exhibit B hereto. Meanwhile, the contamination at sites across the country, as well as those parties responsible for such contamination, continue to migrate.

CERCLA policy requires that owners of contaminated sites, such as Kotrous, be allowed to seek contribution from other PRPs for cleanup costs. In initiating section

107 civil actions, the owners facilitate the statutory goal of casting a broad net of liability. This Court's decision should facilitate CERCLA's goal of holding all responsible parties accountable for remediation of contaminated sites.

B. Kotrous Respectfully Urges This Court To Issue A Decision That Dispels Certain Myths That Continue To Be Raised To Prevent Property Owners From Pursuing Contribution In The Absence Of Government Enforcement.

Kotrous requests that this Court issue a ruling that dispels the following myths that plague the section 107 contribution discussion:

1. All owners or operators of contaminated sites are per se guilty of contamination and/or are bad actors, unless they took action to ensure "innocent landowner" status prior to purchasing contaminated property.

2. Allowing PRPs an implied right to section 107 contribution constitutes judicial legislation and opens wide the door for unendless joint and several cost recovery litigation.

3. Private cleanup actions are inherently irresponsible and inferior to those actions "supervised" by the federal government.

Kotrous suggests that each of these myths are false and without any merit, as set forth herein and in the *Atlantic Research* decision.

1. Private Owners of Contaminated Sites Have a Right to Pursue Contribution From Those Parties Responsible For the Contamination.

All owners or operators of contaminated sites are not necessarily bad actors. Congress apparently recognized this fact as CERCLA construes liberally the right of owners or operators of contaminated sites to sue for recovery of cleanup costs for their contaminated property. *See, e.g.,* 42 U.S.C. § 9607(e)(2) ("Nothing in this title [42 U.S.C. §§ 9601 *et seq.*] . . . shall bar a cause of action that *an owner or operator or any other person* subject to liability under this section, or a guarantor, *has or would have,* by reason of subrogation or otherwise against any person"), emphasis added. If Congress intended to limit the rights of "owners and operators" to sue other PRPs through the enactment of the Superfund amendments, then Congress would have amended section 107(e)(2) to reflect the limitations imposed on owners and operators by the Superfund amendments. Rather than expressing such a limitation, Congress instead created an additional savings clause within the text of section 113(f)(1). 42 U.S.C. § 9613(f)(1) (this subsection does not "diminish the right of any person to bring an action for contribution in the absence of a civil action under CERCLA section 106 or section 107").

2. Upholding an Implied Right to Contribution Under Section 107 Does Not Constitute Judicial Legislation or Inspire Unendless Litigation.

The legislative motives behind CERCLA confirm the validity of the Eighth Circuit's recognition of a contribution action for PRPs under section 107(a). CERCLA's

primary goals are to "force polluters to pay for costs associated with remedying their pollution," (*United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992)), and "to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986). To facilitate these goals, "CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others." *Key Tronic* at 819 n.13.

Disallowing PRPs to enforce the liability of all responsible parties discourages "PRPs from voluntarily initiating a clean-up, contrary to CERCLA's stated purpose of 'induc[ing] such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites.'" *Syms,* 408 F.3d at 106, quoting H.R. Rep. No. 96-1016(I), at 17 (1980). Prohibiting PRPs from suing for contribution under section 106 or 107 "create[s] a perverse incentive for PRPs to wait until they are sued before incurring response costs." *Syms,* 408 F.3d at 106; *see also Pinal Creek,* 118 F.3d at 1301. Section 113 does not "govern" this right to contribution, but rather "creates a mechanism for apportioning" proportionate liability among PRPs during or following a section 106 or section 107 action or a government settlement.

Moreover, authorizing PRPs to seek contribution for cost recovery under section 107 is wholly distinguishable from allowing PRPs to seek joint and several liability from others. *Pinal Creek,* 118 F.3d at 1303, 1306. Nothing within the text of section 107 requires this Court to determine that section 107 only authorizes joint and

several liability. The text does not require such a ruling, nor does equity allow such an interpretation with respect to PRPs pursuing civil actions for contribution among other PRPs. *Id.* Section 107(a)(4)(A) allows governmental entities to recover "*all costs*" whereas section 107(a)(4)(B) allows private parties to recover *any other necessary costs.* This distinction allows this Court to hold that governmental entities may bring an action to hold PRPs liable for *all of its cleanup costs,* jointly and severally. Private parties, however, may only bring a civil action for *any necessary costs,* which equity limits to contribution against other PRPs for their fair share of responsibility.

3. Federal Policy Does Not Support the Suggestion That All Private Cleanups Are Inherently Irresponsible and Unsupervised.

Petitioner contends that this Court should deny private parties the right to initiate CERCLA action because government "supervised" cleanups are inherently superior. Appellants rely on no evidence in the record before this Court to suggest that Congress does not value private cleanup activities. Rather, as noted by Petitioner, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (Brownfields Act) in 2002. The Brownfields Act *encourages* private cleanup and redevelopment of contaminated property and authorizes public grants to support private cleanups. *See, e.g.,* 42 U.S.C. §§ 9604(k), 9607(o)-(r), 9628(a). In fact, the Brownfields Act limits the ability of the federal government to take enforcement action when "a person is conducting or has completed a response action. . . ." 42 U.S.C. § 9621(b)(1)(A)(ii). Though

the Brownfields Act is not now at issue before this Court, these provisions are indicative of Congress' support for private cleanup of contaminated sites.

III. CONCLUSION

Kotrous does not advocate for judicial legislation or any expansion of current litigation under CERCLA. Kotrous does, however, request that this Court adhere to the express Congressional goals of CERCLA in upholding the right of owners of contaminated sites to hold responsible parties accountable for the costs of prompt and complete cleanup of their property. Kotrous respectfully urges this Court to seriously consider the widespread implications of the ultimate decision in this case. For the foregoing reasons, Kotrous asks that this Court uphold the Eighth Circuit's proper interpretation of CERCLA in *Atlantic Research*.

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JAMES KOTROUS, individually and doing business as THE MATTRESS FACTORY,

Plaintiff,

v.

GOSS-JEWETT COMPANY OF NORTHERN CALIFORNIA, INC., et al.,

Defendants.

NO. CIV. S-02-1520 FCD JFM

ORDER

(Filed June 16, 2005)

This matter is before the court on motion to dismiss filed by defendant Bayer Cropscience, Inc., ("Bayer"). The motion seeks dismissal of the First, Third and Fourth Claims in Plaintiff, James Kotrous' ("Kotrous") First Amended Complaint for failure to state a claim on which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the event the court grants this motion, Bayer requests that the court decline to exercise supplemental jurisdiction over Kotrous' remaining state law claims. For the reasons stated herein, Bayer's motion is DENIED.[1]

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[1] Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. Local Rule 78-230.

BACKGROUND

The instant litigation concerns certain real property located at 4301 Power Inn Road in Sacramento, California ("the Site"). From approximately 1970 until 1996, the Site was leased by Goss-Jewett Company of Northern California ("Goss-Jewett"), a defendant in this action. (First Amended Complaint ("FAC") ¶ 8.) Goss-Jewett sold and distributed chemicals used by dry cleaning establishments, including the chemical perchloroethylene ("PCE").

As part of its operations at the Site, Goss-Jewett installed an above-ground storage tank, which was used to store up to 1,000 gallons of PCE prior to its delivery by truck to local dry cleaning businesses. Stauffer Chemical, a predecessor in interest to Bayer, supplied PCE to Goss-Jewett and delivered it by truck to the storage tank. (FAC ¶ 39.) During one or more of these deliveries, Stauffer Chemical "suddenly and accidentally released PCE to the soil and groundwater at the site . . . [resulting in] contamination of the environment." (FAC ¶ 40.)

During the period that Goss-Jewett operated its dry cleaning chemical supply business, ownership of the Site transferred on two occasions. From approximately 1968 to 1976, Albert and Estelle Evans, Esther Volz, Robert and Frances Carmany, and John and Mildred Spurlock co-owned the Site.[2] In 1976, ownership transferred to defendant Edward Anselmo ("Anselmo"), who sold the Site to Kotrous in October of 1995.

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[2] According to the FAC, Albert Evans, Estelle Evans, Esther Volz, Robert Carmany, Frances Carmany, and John Spurlock are deceased. Their respective estates have been named as defendants in this action.

In August of 1996, after Kotrous acquired ownership of the Site, hazardous substance contamination was discovered in soil beneath the storage tank. (FAC ¶ 41.) In 1998, Goss-Jewett conducted a well survey, which identified 35 water wells within 2,000 feet of the Site, including one private well used for domestic water supply. (FAC ¶ 42.) Goss-Jewett then sampled the private well and found it contained heightened levels of PCE. (*Id.*) The well was removed from service. (*Id.*).

In or about February of 2000, the California Regional Water Quality Control Board ("CRWQCB") sent Goss-Jewett a letter requesting a work plan for site assessment and evaluation of groundwater monitoring wells on property down-gradient from the Site. (FAC ¶ 43.) However, Goss-Jewett did not comply and has performed no further work at the Site since it sampled the domestic well in June of 1998, despite repeated requests by the CRWQCB. (*Id.*)

In November of 2001, the CRWQCB issued Cleanup and Abatement Order No. 5-01-714, which required Goss-Jewett and one of its officers, defendant Steven Lamanet ("Lamanet"), to investigate and remediate soil and groundwater contamination at the Site. (FAC ¶¶ 9, 44.) Kotrous was directed to conduct the work if Goss-Jewett and Lamanet failed to do so. (FAC ¶ 44.)

When Goss-Jewett and Lamanet failed to comply with deadlines in the first Cleanup Order, the CRWQCB rescinded that order and issued Cleanup and Abatement Order No. R5-2002-0707, which imposed obligations for site investigation and cleanup on Kotrous, Anselmo and Goss-Jewett. (*Id.*)

Kotrous commenced this action on July 15, 2002, asserting claims for contribution under CERCLA and the

California Hazardous Substance Account Act; declaratory relief under CERCLA, 42 U.S.C. § 9613(g)(2), the Declaratory Judgment Act, 28 U.S.C. § 2201, and state law; public and private nuisance; trespass; equitable indemnity; and injunctive relief. On April 26, 2005, Bayer filed the instant motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c).[3]

STANDARD

Rule 12(c) provides in relevant part that,

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A defense of failure to state a claim upon which relief can be granted may be made by motion for judgment on the pleadings. Rule 12 (h)(2). In considering a motion for judgment on the pleadings presenting a defense of failure to state a claim upon which relief can be granted, this court should employ those standards normally applicable to a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). 5A

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[3] All further references to the "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

Wright & Miller, *Federal Practice and Procedure*, Civil § 1367 at 515-16 (2d ed. 1990).

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Given that the complaint is construed favorably to the pleader, the court may not dismiss the complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45 (1957); *N.L. Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Nevertheless, it is inappropriate to assume that plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

ANALYSIS

Bayer contends that Kotrous' First Claim for contribution under CERCLA must be dismissed because Kotrous is not entitled to assert a claim under either of the two sections of CERCLA which authorize private actions for damages, § 107(a) and § 113(f).

Section 107(a) of CERCLA authorizes private entities to recover costs incurred in cleaning up hazardous waste disposal sites from responsible parties ("PRPs") as defined in the statute. 42 U.S.C. § 9607(a).

Section 113(f), which Congress added to CERCLA through the 1986 Superfund Amendments and Reauthorization Act ("SARA"), provides PRPs with an express right to contribution from other responsible parties. Under § 113(f), a responsible party may seek contribution, (1) "during or following any civil action under § 106 of this title or under § 107(a) of this title" or (2) where the PRP "has resolved its liability to the United States or a State for some or all of a response action . . . in an administrative or judicially approved settlement." 42 U.S.C. § 9613(f).

In *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 125 S. Ct. 577, 583 (2004), the Supreme Court held that a PRP who "voluntarily" incurs response costs (i.e., is not subject to a civil action under § 106 or § 107 and who has not entered into an administrative or judicially-approved settlement) cannot assert a claim for contribution under § 113(f). The court found that the clear language of the statute precluded any contrary result. *Id.*

Bayer contends that, in light of the Supreme Court's decision in *Aviall*, Kotrous cannot maintain a CERCLA contribution claim under § 113(f) because he was not subject to a civil action under § 106 or § 107(a), nor did he enter into a settlement with the federal or state government. The court need not decide whether the Kotrous could meet § 113(f)'s standing requirements because the Ninth Circuit recognized an implied right of contribution in § 107. *Pinal Creek*, 118 F.3d 1298, 1301 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 814-815 (1994)

and *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (1986)); *Western Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 685. The enactment of § 113 in 1986 did not replace the implicit right of contribution in § 107. *Western Props.*, 358 F.3d at 685. SARA contained a savings clause, which provides that "[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U.S.C. § 9613(f)(1) Thus, under controlling Ninth Circuit precedent, a PRP may maintain a claim for contribution under § 107(a).

Bayer's argument that Kotrous' status as a PRP bars him from seeking *any* relief under § 107(a) is based on a mistaken interpretation of Ninth Circuit's decision in *Pinal Creek*. *Pinal Creek* held only that a PRP cannot maintain an action under § 107(a) *for joint and several liability*. *Pinal Creek*, 118 F.3d at 1302 (concluding that the PRP plaintiff was "foreclosed from imposing joint and several liability [on other PRPs]. . . .") However, nothing in *Pinal Creek* suggests that the court intended to abrogate its prior decisions finding an implied right to contribution in § 107(a). To the contrary, *Pinal Creek* clearly recognizes that § 107 incorporates such a claim.[4] *Id.* at 1301 (finding

[4] The court in *Aviall* expressed considerable skepticism regarding whether courts should find an implied right to contribution in § 107. *See Aviall*, 125 S. Ct. at 586 (noting that "[t]o the extent that Aviall chooses to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery) we note that this Court has visited the subject of implied rights of contribution before," and citing cases rejecting the creation of such rights). However, the *Aviall* Court expressly did not decide this issue. *Id.* (" . . . we decline to decide whether *Aviall* has an implied right to contribution under § 107."). Because *Aviall* does not overrule the cases from this circuit

(Continued on following page)

that a claim for contribution is implicitly embedded in the text of § 107); *Western Props.*, 358 F.3d at 685.

Kotrous' First Claim for contribution expressly invokes § 107(a). (*See* FAC ¶¶ 47, 49, 56.) Thus, Kotrous has stated a claim for contribution under CERCLA.

CONCLUSION

For the reasons stated herein, Bayer's motion to dismiss Kotrous' First Claim for contribution under CERCLA is DENIED. Bayer's motion to dismiss Kotrous' Second through Fourth Claims is predicated on this court dismissing Kotrous' CERCLA claim. Accordingly, Bayer's motion to dismiss is DENIED in its entirety.

IT IS SO ORDERED.

DATED: June 16, 2005

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, JR.
UNITED STATES
DISTRICT JUDGE

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that recognize an implied right to contribution in § 107, they remain good law and are binding on this court.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

– – ooOoo – –

JAMES KOTROUS, individually and doing business as THE MATTRESS FACTORY,

Plaintiff,

v.

GOSS-JEWETT COMPANY OF NORTHERN CALIFORNIA, INC., et al.,

Defendants.

NO. CIV. S-02-1520 FCD JFM

ORDER

– – ooOoo – –

This matter is before the court on motion for reconsideration pursuant to Eastern District Local Rule 78-2130(k) of this court's June 26, 2005 Memorandum and Order, filed by defendant Bayer Cropscience, Inc., ("Bayer").[1]

An order that resolves fewer than all of the claims among all of the parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b); 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4478 (2d Ed. 2005) (while authorized, reconsideration of interlocutory orders disfavored). Where reconsideration of a non-final order is sought, the court has "inherent jurisdiction to modify, alter or revoke it." *United States v. Martin*, 226 F.3d 1042,

[1] Eastern District L.R. 78-230(k) provides the procedural rule for filing a motion for reconsideration of "any motion . . . granted or denied in whole or in part."

1048-49 (9th Cir. 2000), *cert denied*, 121 S. Ct. 1671 (2001). To succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision. *See, e.g., Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656,-665 (E.D. Cal.1986), aff'd in part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir. 1987), cert. denied, 486 U.S. 1015 (1988).

Generally, and absent highly unusual circumstances, reconsideration is appropriate only where (1) the party presents the court with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, (3) there is an intervening change in controlling law.[2] *School Dist. No. 1J, Multnomah County, Oregon v. ACANDS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

The court has reviewed Bayer's memorandum in support of its motion for reconsideration and concludes that reconsideration is not warranted. Bayer interprets *Western Properties Service Corp. v. Shell Oil Corp.*, 358 F.3d 678 (9th Cir. 2004), differently than this court and disagrees with the court's conclusion that there is an implied right of contribution in CERCLA section 107(a) independent of section 113(f). However, this is not a valid

[2] While the standards applicable to motions for reconsideration of final judgments or orders under Rules 59(e) (final judgments) and 60(b) (final judgments and orders) technically do not delimit the court's inherent discretion to reconsider interlocutory orders, the court nonetheless finds them to be helpful guides to the exercise its discretion.

ground for reconsideration as the court has committed no clear error of law.[3]

IT IS SO ORDERED.

DATED: August 23, 2005.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

[3] Indeed, Bayer disagrees not just with this Court's interpretation of *Western Properties*, but that of a second judge in this district who reached the same conclusion in a recent CERCLA case. *See Adobe Lumber v. Taecker*, 2005 U.S. Dist. LEXIS 15374 (May 24, 2005).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

– – ooOoo – –

JAMES KOTROUS, individually and doing business as THE MATTRESS FACTORY,

Plaintiff,

v.

GOSS-JEWETT COMPANY OF NORTHERN CALIFORNIA, INC., et al.,

Defendants.

NO. CIV. S-02-1520 FCD JFM

ORDER

– – ooOoo – –

This matter is before the court on defendant Bayer Cropscience Inc.'s motion for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Defendant also moves to stay discovery proceedings if this court grants its motion for certification. Plaintiff James Kotrous and crossclaimant Edward Anselmo oppose the motions. For the reasons set forth below,[1] defendant's motions are GRANTED.

[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

BACKGROUND[2]

Plaintiff commenced this action on July 15, 2002, asserting claims for contribution under CERCLA; declaratory relief under CERCLA and the Declaratory Judgment Act; and various claims under state law. (Pl's Compl., filed July 15, 2002). On April 26, 2005, defendant Bayer Cropscience Inc. filed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). (Def.'s 12(c) Mot., filed Apr. 26, 2005). Defendant argued that plaintiff's contribution claims under CERCLA should be dismissed because plaintiff did not and could not allege the standing requirements of CERCLA § 113(f). (*Id.* at 2). Defendant further argued that plaintiff's remaining federal claims should be dismissed because they are predicated upon the contribution claim. (*Id.*) If all federal claims were dismissed, defendant argued that the state claims should be dismissed for lack of subject matter jurisdiction. (*Id.*)

On June 16, 2005, the court denied defendant's motion to dismiss. (Order, filed June 16, 2005). The court based its order on the Ninth Circuit's decisions in *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), and *Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678 (9th Cir. 2004). (*Id.* at 7-8). In *Pinal Creek,* the Ninth Circuit concluded "that § 107 implicitly incorporates a claim for contribution." *Pinal Creek Group,* 118 F.3d at 1301. The Ninth Circuit further clarified that "the enactment of § 113 . . . did not replace the implicit right to contribution . . . recognized in § 107(a)." *W. Props.*

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[2] The facts of this case are set out in detail in the court's order denying defendant Bayer's motion to dismiss. (Order, filed June 16, 2005). Therefore, the court only discusses those facts relevant to defendant's motion for certification.

Serv. Corp., 358 F.3d at 685. Thus, the court held that a responsible party ("PRP") may maintain a claim for contribution under § 107 without meeting § 113 standing requirements. (Order, filed June 16, 2005, at 8). The court did not reach the issue of whether plaintiff could meet § 113(f)'s standing requirements because it relied on Ninth Circuit precedent recognizing an implied right of contribution in § 107. (*Id.* at 6-7).

On August 23, 2005, the court denied defendant's motion for reconsideration. (Order, filed Aug. 23, 2005). On September 6, 2005, defendant filed the instant motion to certify the court's June 16, 2005 order, and the related August 23, 2005 order for immediate interlocutory appeal. Defendant also moves to stay discovery proceedings if the court grants its motion for certification.

STANDARD

1. Interlocutory Appeal Under 28 U.S.C. § 1292(b)

The general rule is that an appellate court should not review a district court ruling until after entry of a final judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 474 (1978); *In re Cement Antitrust Litig.,* 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.,* 459 U.S. 1190 (1983); *see* 28 U.S.C. § 1291. There is however, an exception to this general rule:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

> termination of the litigation, he shall so state in writing in such order. The Court of Appeals . . . may thereupon . . . permit an appeal . . . if application is made to it within ten days. . . .

28 U.S.C. § 1292(b). The party seeking certification of an interlocutory appeal has the burden to show the presence of those exceptional circumstances. *Coopers & Lybrand,* 437 U.S. at 474-75.

Section 1292 identifies three factors that must be present in order for the court to certify an appeal. First, the issue to be certified must involve a controlling issue of law. An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.,* 673 F.2d at 1026 (citing *U.S. Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966)). Second, there must be substantial ground for difference of opinion on that issue. A party's strong disagreement with the court's ruling is not sufficient for there to be a "substantial ground for difference"; the proponent of an appeal must make some greater showing. *Kern-Tulare Water Dist. v. Bakersfield,* 634 F. Supp. 656, 667 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds,* 828 F.2d 514 (9th Cir. 1987). Third, an interlocutory appeal must be likely to materially speed the termination of the litigation. This factor is linked to whether an issue of law is "controlling" in that the court should consider the effect of a reversal by the court of appeals on the management of the case. *See In re Cement Antitrust Litig.,* 673 F.2d at 1026.

2. Stay Pending Appeal

Both Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(b) give the district court discretion to stay the proceedings pending an appeal. Moreover, this court possesses the inherent power to control its own docket and calendar. *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (citations omitted).

> A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule . . . does not require that the issues in such proceedings are necessarily controlling of the action before the court.

Id. (quoting *Leyva v. Certified Grocers*, 593 F.2d 857, 863-64 (9th Cir. 1979).

ANALYSIS

1. Controlling Issue of Law

Defendant argues that the court's ruling with respect to whether a PRE must meet the standing requirements of CERCLA § 113 before bringing § 107 contribution claim is a controlling issue of law because resolution of the issue determines whether plaintiff's claims are viable. (Def.'s Mot., filed Sept. 5, 2005, at 4-5). If a § 107 contribution claim requires plaintiff to meet § 113 standing requirements, defendant argues that plaintiffs claims must be dismissed. (*Id.*) Defendant argues that plaintiff has not alleged compliance with § 113 standing requirements in his first amended complaint, nor could plaintiff likely

plead § 113 standing requirements if given leave to amend the complaint. (*Id.* at 5).

An issue is "controlling" if "resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at 1026. If a PRP is required to fulfill the standing requirements of § 113 in order to bring contribution claims, plaintiff's federal claims for contribution under CERCLA may be dismissed. Plaintiff's other federal claims are for declaratory relief relating to rights, duties, and liabilities for future recovery of cost or damages. (Pl.'s First Amended Compl., filed Nov. 22, 2002, ¶¶ 67-72). These claims are dependant upon plaintiff's contribution claims. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000). If plaintiff's federal claims for contribution must be dismissed for lack of standing, the federal declaratory relief claims will be dismissed, and plaintiff's complaint will only allege state law claims. The resolution of whether a PRP must meet § 113 standing requirements to bring an action for contribution will determine whether plaintiff has jurisdiction to bring an action in this court. Thus, the court's June 16, 2005 order denying Bayer's motion to dismiss includes a controlling issue of law.

Crossclaimant Anselmo argues that even if § 113 standing is required, the court will still have jurisdiction if plaintiff and crossclaimant are allowed to amend the complaint to state a cause of action for injunctive relief under the Resource Conservation and Recovery Act ("RCRA"). (Crossclaimant's Opp'n, filed Sept. 20, 2005, at 5-6). This argument is unavailing. A contribution action under CERCLA and an injunctive relief action under RCRA are two entirely different claims for relief. Even if the court grants leave to amend, the issue of whether

§ 107 contains an implied right of action separate from § 113 standing requirements is a controlling issue of law because it will materially affect the outcome of the litigation.

2. Substantial Ground for Difference of Opinion

Defendant argues that there is a substantial ground for difference of opinion as to whether a PRP must allege § 113 standing requirements in order to properly plead a § 107 contribution claim. (Def.'s Mot. at 5-6). Defendant points to the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall,* 125 S.Ct. 577 (2004) and the decision of the Central District of California in *City of Rialto v. United State Department of Defense,* No. EDCV 04-00079 (C.D. Cal. filed Aug. 16, 2005). (*Id.*)

In *Aviall,* the Supreme Court held that a PRP who "voluntarily" incurs response costs cannot assert a claim for contribution under § 113(f). 125 S. Ct. at 583. The Court expressly declined to decide whether the plaintiff has an implied right of contribution under § 107. *Id.* at 586. However, the Court noted that it had "visited the subject of implied rights of contribution before" and cited cases rejecting the creation of such rights. *Id.* The Court did not overrule the cases from this circuit that recognize an implied right to contribution in § 107, but did express considerable skepticism regarding whether courts should find such an implied right. *Id.*

In *Rialto,* the Central District of California interpreted the Ninth Circuit's decisions in *Western Properties* and *Pinal Creek* as requiring a PRP to satisfy § 113 standing requirements in order bring a § 107 contribution claim. No. EDCV 04-00079, at 7-8. The *Rialto* court rejected the

plaintiff's argument that a § 107 contribution claim is available regardless of the a party's ability to satisfy § 113 standing requirements. *Id.* at 8-9. Specifically, the *Rialto* court held that, although the Ninth Circuit distinguished the matter decided in *Western Properties* from that decided by the Supreme Court in *Aviall* based upon the plaintiff's allegation under § 107(a), the Ninth Circuit ultimately based its conclusion that jurisdiction was proper upon the plaintiff's compliance with § 113 standing requirements. *Id.* at 9-10. Therefore, the *Rialto* court dismissed the plaintiff's claims for failure to allege facts that satisfy § 113 standing requirements. *Id.* at 14.

The Supreme Court's skepticism in *Aviall* in conjunction with the alternate interpretation of Ninth Circuit precedent by the district court in *Rialto* demonstrate that reasonable jurists may differ in determining the standing requirements for a CERCLA contribution claim. While two other district courts have agreed with this court's interpretation of Ninth Circuit precedent,[3] the issue is by no means unambiguous. Thus, a substantial ground for difference of opinion exists.

3. Materially Speed the Termination of Litigation

If § 113 standing requirements must be satisfied to bring a § 107 claim, plaintiff's CERCLA contribution

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[3] The Eastern District of California held that a PRP may bring a CERCLA § 107 claim without meeting § 113 standing requirements. *Adobe Lumber v. Taecker*, No. CV S02-186, 2005 WL 1367065, *1 (E.D. Cal. May 24, 2005). The Northern District of California also held that § 113 standing requirements did not need to be met. *Ferguson v. Arcata Redwood Co.*, No. C 03-05632, 2005 WL 1869445, *6 (N.D. Cal. Aug. 5, 2005).

claims may likely be dismissed, resulting in a lack of federal subject matter jurisdiction. Based upon the importance of this issue in determining the jurisdiction of the court, resolution of this issue by the Ninth Circuit will materially speed the termination of litigation.

4. Timeliness of Defendant's Certification Motion

Plaintiff and counterclaimant argue that defendant's motion 3 should be denied because it was not brought in a timely manner. Specifically, they contend that defendant's delay in bringing this motion until three months after the entry of this court's order waives the right to seek this remedy. (Counterclaimant's Opp'n at 2; Pl's Opp'n at 6-7). Section 1292(b) contemplates an expedited procedure for interlocutory appeals. *See Martens v. Smith Barney, Inc.*, 238 F. Supp. 2d 596, 600 (S.D.N.Y. 2002) (denying motion for interlocutory appeal where plaintiffs allowed almost months to pass before filing the motion and offered no reasonable explanation for the delay). However, in this case, there is a reasonable justification for defendant's delay. The Central District of California's decision in *Rialto* was filed on August 16, 2005. Defendant filed the motion on September 6, 2005. Therefore, because defendant filed this motion in a timely manner after discovering information relevant to the certification motion, plaintiff's argument that defendant's motion is untimely is unavailing.

5. Stay of Discovery Proceedings

Defendant requests a stay of discovery, pending the Ninth Circuit's ruling on the issue. (Def.'s Mot. at 7-8). "A district court has inherent discretion to control the

disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants." *Filtrol Corp. v. Kelleher,* 467 F.2d 242 (9th Cir. 1972). Because the issue before the Ninth Circuit may be dispositive of plaintiff's federal claims, a stay of the proceedings at this point will promote economy of time and effort for both the parties and the court.

CONCLUSION

For the reasons stated herein, defendant's motion for certification pursuant to 28 U.S.C. § 1292(b) is GRANTED. Defendant's motion to stay proceedings pending the outcome of its interlocutory appeal is GRANTED. All dates are hereby VACATED.

IT IS SO ORDERED.

DATED: October 4, 2005.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

EXHIBIT B

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

Sacramento Main Office
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3443 Routier Road, Suite A, Sacramento, California 95827-3003
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[LOGO]
Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

8 February 2002

CERTIFIED MAIL #
7000 0520 0024 2571 4089

Goss-Jewett Corp. of Northern California
and Mr. Steve Lamanet
c/o Mr. William Burns, Esq.
15720 Winchester Boulevard
Los Gatos, CA 95030

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Mr. James Kotrous
The Mattress Factory
4301 Power Inn Road
Sacramento, CA 95826

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Mr. Edward Anselmo
770 Coronado Blvd
Sacramento, CA 95864

CLEANUP AND ABATEMENT ORDER NO. R5-2002-0707, MONITORING AND REPORTING PROGRAM NO. R5-2002-0801, GOSS-JEWETT CORPORATION FACILITY, SACRAMENTO, SACRAMENTO COUNTY

On 30 November 2001, I issued Cleanup and Abatement Order (CAO) No. 5-01-714 requiring investigation and cleanup of soil and groundwater at the former Goss-Jewett Corporation facility at 4301 Power Inn Road in Sacramento. At the same time, I issued Monitoring and Reporting Program (MRP) No. 5-01-842. Soil and groundwater beneath the site are polluted with tetrachloroethylene (PCE), with groundwater concentrations up to 8,100 ug/l, and no investigation or cleanup is currently underway.

CAO No. 5-01-714 was issued to Goss-Jewett Corporation of Northern California (Goss-Jewett), Mr. Steve Lamanet (vice president and general manager of Goss-Jewett), and Mr. James Kotrous (owner of the property at 4301 Power Inn Road). The CAO initially required Goss-Jewett and Mr. Steve Lamanet to perform the work to achieve compliance, but if those parties failed to do so, the CAO stated Mr. Kotrous would also be required to conduct the work. Neither Goss-Jewett nor Mr. Steve Lamanet has complied with the first two deadlines in the CAO.

Therefore, CAO No. 5-01-714 is hereby rescinded and enclosed is CAO Order No. R5-2002-0707. This CAO is issued to Goss-Jewett Corporation, Mr. Steve Lamanet, Mr. James Kotrous, and Mr. Edward Anselmo, the former owner of 4301 Power Inn Road. Mr. Anselmo leased the property to Goss-Jewett Corporation for about 20 years. Also enclosed is MRP No. R5-2002-0801, which requires the four parties to monitor the groundwater quarterly for

constituents of concern. This MRP replaces MRP No. 5-01-842, which is hereby rescinded.

Failure to comply with the provisions of the CAO and/or MRP could result in the Regional Board imposing civil liability, including liability up to one thousand dollars ($1,000) for each day that required technical reports are past due. Both Goss-Jewett and Steve Lamanet are also under a Probation Order through the Sacramento County District Attorney's Office. The DA's Office has informed us that noncompliance with the CAO also constitutes a violation of the Probation Order.

If you have any questions regarding the CAO or MRP, or need additional information, you may contact Wendy Cohen at (916) 255-3075.

/s/ Thomas R Pinkos
for GARY M. CARLTON
Executive Officer

Thomas R. Pinkos
Assistant Executive Officer

Enclosures

cc: Regional Board Members
Ms. Frances McChesney, Office of Chief Counsel, SWRCB, Sacramento
Mr. Darrin Polhemus, Compliance Assurance & Enforcement Unit, SWRCB, Sacramento
Ms. Lisa Burroughs, Esq., Sacramento County District Attorney's Office, Sacramento
Mr. Dana Booth, Sacramento County Environmental Management Department, Sacramento
Mr. Robert Randall, Jr., Procter & Gamble, Sacramento
Mr. Michael Lamanet, Goss-Jewett Co., Fresno
Mr. Jerry Fong, Carey & Carey, Palo Alto

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT
ORDER NO. R5-2002-0707
FOR
GOSS-JEWETT CORPORATION OF
NORTHERN CALIFORNIA, INC.,
STEVE LAMANET,
EDWARD ANSELMO,
AND JAMES KOTROUS
FORMER GOSS-JEWETT FACILITY
SACRAMENTO, SACRAMENTO COUNTY

This Order is issued to Goss-Jewett Corporation of Northern California, Inc. (Goss-Jewett), Steve Lamanet, Edward Anselmo, and James Kotrous based on provisions of California Water Code Section 13304, which authorizes the Regional Water Quality Control Board, Central Valley Region (Regional Board) to issue a Cleanup and Abatement Order. Goss-Jewett, Steve Lamanet, Edward Anselmo, and James Kotrous are hereafter collectively referred to as Discharger.

The Regional board finds, with respect to the Discharger's acts or failure to act, the following:

1. The property at 4301 Power Inn road, Sacramento (Attachment 1) is owned by James Kotrous. From 1976 until October 1995, the property was owned by Edward Anselmo. Goss-Jewett operated on the northern part of the property for about 25 years as a dry cleaning chemical distribution facility. Mr. Steve Lamanet is a vice president and the general manager of Goss-Jewett. Goss-Jewett leased the property from Edward Anselmo until October 1995. The existing lease continued until it expired in June 1996. The site

is currently occupied by The Matters Factory, a retail bedding store owned by Mr. Kotrous.

2. On 30 November 2001, the Executive Officer issued Cleanup and Abatement Order No. 5-01-714 to Goss-Jewett, Steve Lamanet, and James Kotrous. That Order stated Goss-Jewett and Mr. Lamanet were initially required to perform the work to achieve compliance, and if they failed to do so, Mr. Kotrous would be required to perform the work after notification by the Board and issuance of a revised Cleanup and Abatement Order. Neither Goss-Jewett nor Mr. Lamanet has complied with Order No. 5-01-714.

3. Edward Anselmo is subject to this Order because as the former owner of the property, he leased the property to Goss-Jewett and Steve Lamanet and permited them to conduct activities that caused waste to be discharged and deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance. James Kotrous is subject to this Order because as the owner of the property, he leased the property to Goss-Jewett and Steve Lamanet and permitted them to conduct activities that caused waste to be discharged or deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance. In addition, James Kotrous, as the current owner of the property, is a person who has caused or permitted waste to be discharged to waters of the state where it has created and threatens to create a condition of pollution or nuisance because he has knowledge of the discharge and the ability to control it. Goss-Jewett and Steve Lamanet are subject to this Order because they conducted activities at the property that caused or permitted waste to be discharged or deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance.

4. On 4 January 1996, Sacramento County Environmental Management Department (Sacramento County) and the City of Sacramento, Division of Hazardous Materials (City) responded to allegations from a former employee that Goss-Jewett was illegally storing hazardous materials at the site. Upon arrival, Sacramento County and City representatives observed approximately 100 55-gallon containers, some with unknown liquids, and a trailer that contained numerous chemical containers in various stages of degradation. Many of the containers had failed, and there were solids and liquids mixed on the floor of the trailer, which had major corrosion. Near the trailer was an aboveground storage tank (AGT) that contained about 800 to 1,000 gallons of tetrachloroethene (PCE). The PCE dispenser did not have a nozzle and, according to the Sacramento County incident report, "it appeared that there was a lot of perc [PCE] that had leaked into the soil." A near surface soil sample obtained near the PCE dispenser contained 300 ppm of PCE.

5. The AGT was removed at an unknown time in 1996. During August 1996, Goss-Jewett attempted to remove contamination by excavating soil from beneath the former AGT. A soil sample obtained at 6.5 feet below the ground surface (bgs) from the base of the excavation contained 330 ppm of PCE. Sacramento County assumed. lead regulatory agency status for the environmental cleanup after the soil excavation was completed.

6. On 10 January 1997, Kleinfelder, Inc., an environmental consulting firm, installed a soil vapor monitoring well (SVW-1) to 31 feet bgs at the location of the former AGT. Kleinfelder reported up to 3 ppm of PCE at 5 feet bgs in soil samples obtained from the boring for the well. Based on the results of the soil sampling, Sacramento County required Goss-Jewett to install a

groundwater monitoring well adjacent to the AGT. On 5 May 1997, Kleinfelder installed groundwater monitoring well MW-1 about 20 feet southeast of the former AGT. The groundwater sample obtained from MW-1 contained 2,700 µg/l of PCE.

7. On 4 December 1997, Ramage Environmental conducted a short-term (1.25 hours) soil vapor extraction test at SVW-1. Ramage did not analyze extracted soil vapors in the field or retain soil vapor samples for chemical analysis. The extraction test indicated that short-circuiting was not occurring but did not adequately assess the viability of a soil vapor extraction system.

8. In January 1998, Ramage installed groundwater monitoring well MW-2 about 50 feet northeast of the farmer AGT and groundwater/soil vapor monitoring well SVW-1A within the former AGT excavation. Groundwater samples obtained by Ramage in January 1998 contained 8,100 µg/l (SVW-1A), 6,400 µg/l (MW-1), and 1,300 µg/l (MW-2) of PCE, respectively.

9. Based on the results of the groundwater investigation, Sacramento County required Goss-Jewett to conduct a well survey. The well survey showed that 35 wells existed within 2,000 feet of the site, including a private well used for domestic supply within 500 feet south and downgradient from the site. Goss-Jewett subsequently sampled that well on 22 June 1998 and it contained 754 µg/l of PCE. The well was removed from service and municipal water was supplied the day the results were released to Sacramento County. Goss-Jewett has not conducted additional environmental investigation/remediation since the domestic well was sampled.

10. In a letter dated 28 September 1999, Sacramento County requested that the Regional Board assume

lead regulatory agency status for the environmental cleanup at the site. At the time of the request, the Sacramento County District Attorney was pursuing criminal charges against Goss-Jewett and Mr. Steve Lamanet for hazardous waste handling and storage violations.

11. On 20 January 2000, the District Attorney negotiated separate plea agreements with Goss-Jewett, which included a $100,000 fine and probation, and Mr. Lamanet, which included a $25,000 fine and probation.

12. On 17 February 2000, Regional Board staff sent Goss-Jewett a letter requesting a work plan for site assessment and an evaluation of groundwater monitoring wells on the Proctor & Gamble property south of the site for inclusion in the site investigation. Goss Jewett replied in an unsigned, undated letter received on 4 April that it "is no longer in a position to continue the program it started in 1995."

13. On 21 June 2000, the Board's Executive Officer sent Goss-Jewett Corp. and Steve Lamanet a letter requiring the following information pursuant to Section 13267 of the California Water Code:

    a. By 7 July 2000, the name and title of an officer of Goss-Jewett Corp. (Goss-Jewett's authorized representative) who will be responsible for all communications with the Board. All technical reports submitted by Goss-Jewett were required to include a statement signed by the authorized representative of Goss-Jewett certifying under penalty of law that the representative has examined and is familiar with the report and that to his knowledge, the report is true, complete, and accurate.

    b. By 21 July 2000, a work plan for site assessment prepared in general accordance with the attached outline that included a sufficient number of soil

borings and wells to determine the vertical and lateral extent of contaminants originating from the site.

c. By 21 July 2000, an evaluation of the location and historical groundwater data from the Proctor & Gamble (P&G) wells for potential incorporation in future groundwater contamination assessments. In a letter dated 9 July 1998, P&G recommended that its monitoring wells be included in the Goss-Jewett groundwater monitoring program.

d. By 22 December 2000, an interim remedial action plan for on-site soil and groundwater contamination.

Goss-Jewett Corp. and Mr. Lamanet have not submitted the required items

14. The Fourth Edition of the *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (Basin Plan) establishes beneficial uses of the waters of the state and water quality objectives to protect those uses. The beneficial uses of the groundwater beneath the site are domestic, municipal, industrial, and agricultural supply.

15. PCE is a refined hydrocarbon product, is not naturally-occurring, and is a known human carcinogen. Pollution of groundwater with elevated concentrations of PCE impairs the beneficial uses of the groundwater.

16. The water quality objectives in the Basin Plan for PCE include the state primary maximum contaminant level (MCL) specified in Title 22 California Code of Regulations and the Basin Plan's narrative toxicity objective for groundwater. The MCL for PCE is 5 µg/l and the numeric standard necessary to comply with

the narrative toxicity objective is 0.06 µg/l based on Department of Health Services Public Health Goal. The groundwater exceeds the water quality objectives for PCE. PCE is a waste as defined in Water code section 13050. The exceedance of applicable water quality objectives in the Basin Plan is pollution as defined in Water Code section 13050. The Discharger has caused or permitted waste to be discharged or deposited where it has discharged to waters of the state and has created, and continues to threaten to create, a condition of pollution or nuisance.

17. The State Water Resources Control Board has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*. This Policy sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup standards be consistent with State Water Board Resolution 68-16 (the antidegradation policy). Resolution 92-49 and the Basin Plan establish the cleanup levels to be achieved Resolution 92-49 requires the waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with Title 23 California Code of Regulations section 2550.4. Any alternative cleanup level to background must (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water; and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State Water Resources Control Board.

18. Section 13304(a) of the California Water Code provides that:

"Any person who has discharged or discharges waste into waters of the state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In any such suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

19. Section 13267(b) of the California Water Code provides that:

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of discharging, or who proposes to discharge waste outside of its region that could affect the quality of waters of the state within its region shall furnish, under penalty of perjury,

technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."

The technical reports required by this Order are necessary to assure compliance with this Order. Existing data and information about the site indicates that waste, including PCE, has been discharged or is discharging at the property, which is owned, formerly owned, or leased by the Dischargers named in this Order.

20. Section 13304(c)(1) of the California Water Code provides that:

"... the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions..."

21. If the Discharger fails to comply with this Cleanup and Abatement Order, the Executive Officer may request the Attorney General to petition the superior court for the issuance of an injunction.

22. If the Discharger intentionally or negligently violates this Cleanup and Abatement Order, then the Discharger may be liable civilly in a monetary amount provided by the California Water Code.

23. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality

Act, pursuant to Section 15321(a)(2), Title 14, California Code of Regulations.

24. Any person affected by this action of the Board may petition the State Water Resources Control Board (State Board) to review the action in accordance with Title 23 California Code of Regulations Sections 2050-2068. The State Board must receive the petition within 30 days of the date of this Order. Copies of the law and regulations applicable to filing petitions will be provided upon request. In addition to filing a petition with the State Board, any person affected adversely by this Order, may request the Regional Board to reconsider this Order. Such request should be made within 30 days of the date of this Order. Note that even if reconsideration by the Regional Board is sought, filing a petition with the State Board within the statutory time period is necessary to preserve the petitioner's legal rights.

IT IS HEREBY ORDERED that, pursuant to Section 13304 and Section 13267 of the California Water Code, Goss-Jewett Corporation of Northern California Inc., Steve Lamanet, Edward Anselmo, and James Kotrous shall:

1. Reimburse the Regional Water Quality Control Board for reasonable costs (as estimated by Board staff at the beginning of each fiscal year) associated with oversight of the cleanup of this facility. Failure to do so shall be considered a violation of this Order. By **15 March 2002**, submit the name and address of the person who will receive and be responsible for payment of invoices.

2. Investigate, clean up, and abate, forthwith, soil and groundwater polluted by activities at 4301 Power Inn Road, Sacramento, in conformance with the State Board's Resolution No. 92-49 *Policies and Procedures*

for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304 and with the Regional Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV). "Forthwith" means as soon as is reasonably possible. Compliance with this requirement shall include, but not be limited to, completing the tasks listed below.

All site assessment work plans and reports and feasibility studies shall contain the information listed in Attachments 2, 3, and 4, respectively, which are made part of this Order. Work shall be conducted only after work plans are approved or conditionally approved by Regional Board staff. All reports shall include a cover letter from the Discharger stating concurrence or nonconcurrence with the conclusions and recommendations in the report.

As required by the California Business and Professions Code Sections 6735, 7835, and 7835.1, all reports shall be prepared by, or under the supervision of, a registered professional engineer or geologist and signed by the registered professional.

The Discharger shall complete the following tasks by the listed dates:

SITE ASSESSMENT

a. By **29 March 2002**, submit a work plan for site assessment of soil and groundwater pollution; which contains the information in Attachment 2. The work plan shall include a sufficient number of soil gas sampling points and wells to determine the vertical and lateral extent of contaminants originating from the site. The work plan also shall include a well survey identifying all

water supply wells within a ½-mile radius of the site and plans to sample these wells.

b. Within **30 days** of staff approval of the work plan for site assessment, implement the work plan in accordance with the approved time schedule, which shall become part of this Order.

c. Submit a site assessment report for soil and groundwater in accordance with the approved time schedule, but no later than **26 July 2002**. The site assessment report shall contain the information in Attachment 3 and include recommendations and a work plan for additional investigation, if needed. The work plan for additional investigation shall include a sufficient number of soil gas sampling points and wells to determine the vertical and lateral extent of pollutants originating from the site. Within **30 days** of staff approval of the work plan for additional site assessment, the Discharger shall implement the work plan and submit a site assessment report, which contains the information in Attachment 3, in accordance with the approved time schedule, which shall become part of this Order.

d. By **26 July 2002**, submit a plan to provide a replacement water supply for any water supply wells above the Department of Health Services' Public Health Goal of 0.06 µg/l.

SOIL FEASIBILITY STUDY AND REMEDIATION

e. By **23 August 2002**, submit a *Feasibility Study/ Remedial Options Evaluation Report* for remediation of the soil at the site, which contains the information in Attachment 4. The preferred alternative must meet the range of cleanup levels as described in the Basin Plan and Resolution

92-49. The Discharger shall attempt to clean up each constituent to background concentrations, or to the level that is technically and economically feasible and at least achieves the water quality objectives of the Basin Plan.

f. Within **30 days** of staff approval of the *Feasibility Study/Remedial Options Evaluation Report* but no later than **30 December 2002**, submit a *Soil Remedial Action Plan* which describes the approved alternative(s) for soil remediation and includes a time schedule to conduct the remediation activities. The approved time schedule to implement the soil remediation shall become a part of this Order.

g. Within **60 days** of Executive Officer approval of the *Soil Remedial Action Plan*, commence soil remediation or installation of the soil remediation system. The Discharger shall notify staff by telephone prior to beginning field work.

h. Within 120 days of Executive Officer approval of the *Soil Remedial Action Plan*, submit a report describing the status and results of the soil remedial work (*Soil Remedial Action Implementation Report*). The report shall also clearly show whether the installation of any remediation system is complete, and if not, give a schedule and proposed work plan for installation of the remaining soil remedial activities, including a proposed monitoring plan.

GROUNDWATER FEASIBILITY STUDY AND REMEDIATION

i. Within **60 days** of submittal of the *Soil Remedial Action Plan* but no later than **28 February 2003**, submit a *Feasibility Study/Remedial Options Evaluation Report* for remediation of the

groundwater at the site, which contains the information in Attachment 4. The preferred alternative must meet the range of cleanup levels as described in the Basin Plan and Resolution 9249. The Discharger shall attempt to clean up each constituent to background concentrations, or to the level that is technically and economically feasible and at least achieves the water quality objectives of the Basin Plan.

j. Within **60 days** of staff approval of the *Feasibility Study/Remedial Options Evaluation Report*, submit a *Groundwater Remedial Action Plan* which describes the approved alternative(s) for groundwater remediation and includes a time schedule to conduct the remediation. The approved time schedule to implement the groundwater remediation shall become a part of this Order.

k. Within **60 days** of staff approval of the *Groundwater Remedial Action Plan*, commence groundwater remediation or installation of the groundwater remediation system. The Discharger shall notify staff by telephone prior to beginning fieldwork.

l. Within **120 days** of staff approval of the *Groundwater Remedial Action Plan*, the Discharger shall submit a report describing the status and results of the groundwater remedial work (*Groundwater Remediation Implementation Report*). The report shall also clearly show whether the installation of any remediation system is complete, and if not, give a schedule and proposed work plan for installation of the remaining groundwater remedial activities, including a proposed monitoring plan.

m. The Discharger shall conduct periodic monitoring of groundwater and soil gas the existing wells and any additional wells in accordance with Monitoring and Reporting Program No. R5-2002-0801.

3. If, for any reason, the Discharger is unable to perform any activity or submit any document in compliance with the schedule set forth herein, or in compliance with any work schedule submitted pursuant to this Order and approved by the Executive Officer, the Discharger may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. An extension shall be granted only by revision of this Order.

4. Upon startup of any remediation system(s), operate the remediation system(s) continuously, except for periodic and required maintenance. Any interruptions in the operation of the remediation system(s), other than for maintenance or emergencies, without prior approval from the Executive Officer is a violation of this Order.

5. Periodically optimize remedial systems and report on the effectiveness of the optimization in the Annual Report.

6. Notify Regional Board staff at least three working days prior to any onsite Work, testing or sampling.

7. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning the work.

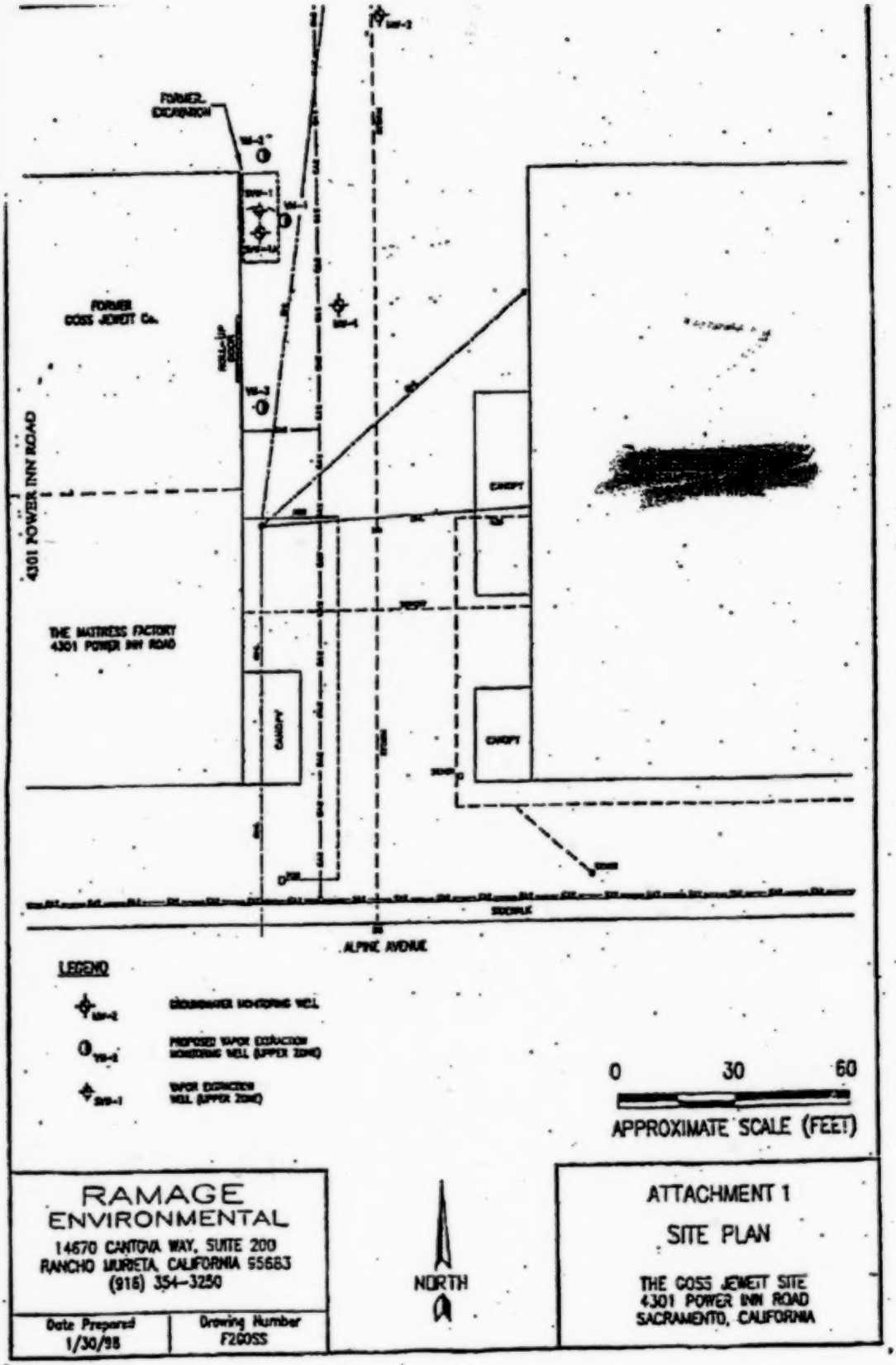
8. Continue any remediation or monitoring activities until such time as the Executive Officer determines that sufficient cleanup has been accomplished and this Order has been rescinded.

9. If, in the opinion of the Executive Officer, the Discharger fails to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability. The Executive Officer may also request action by the Sacramento County District Attorney.

This Order is effective upon the date of signature.

/s/ Gary M. Carlton
GARY M. CARLTON,
Executive Officer

8 FER 2002
(Date)


FORMER EXCAVATION
FORMER COSS JEWETT Co.
4301 POWER INN ROAD
THE MATTRESS FACTORY
4301 POWER INN ROAD
CANOPY
CANOPY
ALPINE AVENUE
LEGEND
0 30 60
APPROXIMATE SCALE (FEET)
NORTH
RAMAGE ENVIRONMENTAL
14670 CANTOVA WAY, SUITE 200
RANCHO MURIETA, CALIFORNIA 95683
(916) 354-3250
Date Prepared
1/30/98
Drawing Number
F2COSS
ATTACHMENT 1
SITE PLAN
THE COSS JEWETT SITE
4301 POWER INN ROAD
SACRAMENTO, CALIFORNIA

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

Sacramento Main Office
Internet Address: http://www.swrcb.ca.gov/rwqcb5
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[LOGO]
Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

ATTACHMENT 2

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT WORK PLAN

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment work plans submitted to the Board. All work plans must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. BACKGROUND

A. *Site History*

State all operations conducted at the site.
Identify present and hisotric [sic] chemical usage and handling procedures.
List all chemical spills and their disposition.
Identify all past and present above ground and under ground tank locations.
Identify tank capacities and other specifications as necessary.
Identify tank contents, past and present.

Submit all records of tests or repairs on fuel lines and tanks.
Identify locations of maintenance shops, chemicals used in the shops, method of chemical storage and disposal.

B. *Topographic map of site vicinity showing:*
All natural and man-made drainage features including ditches and surface impoundments, and the drainages destination;
Utilities, especially storm drain system;
Location of existing monitoring wells, including those installed by other parties;
Location of above ground and underground storage tanks, other waste-handling facilities, and/or spill site;
Location of a major body of water relative to the site;
Location of any nearby private, municipal, or irrigation wells; and
Other major physical and man-made features.

C. *Geology/Hydrogeology*
Include proposal for logging of boreholes and characterizing site geology, and identifying unconfined or confined aquifers and contaminant flowpaths.

II. PREVIOUS SITE ASSESSMENTS

Provide a detailed description of any previous site assessment conducted to determine if there is any soil or ground water contamination. Include analytical results of all soil and water samples analyzed, and water level and floating product measurements.

III. FIELD INVESTIGATION

A. *General*
Monitoring well locations and rationale
Survey details

Equipment decontamination procedures
Health and safety plan

B. *Drilling Details*
Describe drilling and logging methods

C. *Monitoring Well Design*
Casing diameter
Borehole diameter
Depth of surface seal
Well construction materials
Diagram of well construction
Type of well cap
Size of perforations and rationale
Grain size of sand pack and rationale
Thickness and position of bentonite seal and sand pack
Depth of well, length and position of perforated interval

D. *Well Development*
Method of development to be used
Method of determining when development is complete
Method of development water disposal

E. *Soil Sampling*
Cuttings disposal method
Analyses to be run and methods
Sample collection and preservation method
Intervals at which soil samples are to be collected
Number of soil samples to be analyzed and rationale
Location of soil samples and rationale
QA/QC procedures

F. *Well Sampling*
Minimum time after development before sampling (48 hours)

Well purging method and amount of purge water
Sample collection and preservation method
QA/QC procedures

G. *Water Level Measurement*
Elevation reference point at each monitoring well shall be within 0.01 foot. Ground surface elevation at each monitoring well shall be within 0.1 foot. Method and time of water level measurement shall be specified.

IV. QA/QC PROCEDURES

Specify number of field blanks and duplicates.

V. TIME SCHEDULE FOR PROPOSED WORK

The work plan shall include a time schedule for implementation of work.

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

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Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

ATTACHMENT 3

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment reports submitted to the Board. Other supporting data to be included in the report, either within the text of the report or in appendices, are italicized at the end of each section. All reports must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. INTRODUCTION

Summary of past investigations
Purpose of the recent investigation
Scope of the recent investigation
Time period in which the recent investigation was carried out

II. SUMMARY

Number of wells drilled
Results of soil and water analyses
Ground water flow direction and gradient
Possible source determination

III. FIELD INVESTIGATION

Well Construction

Number and depth of wells drilled
Date(s) wells drilled
Description of drilling and construction
Approximate locations relative to facility site(s)

Supporting Data:
A well construction diagram for each well should be included in the report which shows the following details:

Total depth drilled
Depth of open hole (same as total depth drilled if no caving occurs)
Footage of hole collapsed
Length of slotted casing installed
Depth of bottom of casing
Depth to top of sand pack
Thickness of sand pack
Depth to top of bentonite seal
Thickness of bentonite seal
Thickness of concrete grout
Boring diameter
Casing diameter
Casing material
Size of perforations
Number of bags of sand
Well elevation at top of casing
Depth to ground water
Date of water level measurement
Monitoring well number
Date drilled
Location

Well Development

Date(s) of development of each well
Method of development
Volume of water purged from well
How well development completion was determined
Method of effluent disposal

Supporting Data:

Field notes from well development should be included in report.

Water Sampling

Date(s) of sampling
How well was purged
How many well volumes purged
Levels of temperature, EC, and pH at stabilization
Sample collection, handling, and preservation methods
Sample identification
Analytical methods used

Soil Sampling

Date(s) of sampling
Sample collection, handling, and preservation method
Sample identification
Analytical methods used

IV. FINDINGS OF THE INVESTIGATION

Lithology

Types of sediments encountered
Presence, location, and lateral continuity of any significant sand, silt, or clay layers
Any visual signs of contamination

Supporting Data:

Well logs geologic cross-sections should be included in the report.

Analytical Results of Soil and Ground Water Sampling

Analytical results of each monitoring well should be summarized

Supporting Data:

Laboratory analytical sheets
Chain-of-custody forms

Water Levels

Static water levels measured when well drilled
Date(s) of water level measurements
Water levels determined prior to sampling

Supporting Data:

Dates of water level measurement, depths to ground water, and ground water elevations should be tabulated and included in the report.

Ground Water Gradient and Flow Direction

Ground water gradient and flow direction determined by the investigation should be discussed and compared to the regional gradient and flow direction.

Supporting Data:

A ground water contour map, drawn to scale, should be provided which shows each well, its ground water elevation, and lines of equal ground water elevation. Ground water gradient and flow direction should be shown on the map. The calculation of the gradient should be included.

V. RESULTS OF QA/QC

QA/QC procedures
QC sample identification
Field blank analyses
Comparison of duplicate sample results

VI. CONCLUSIONS AND RECOMMENDATIONS

Note any contamination found

Identify any suspected source of contamination, if possible

Recommend any further investigative needs

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ATTACHMENT 4

ITEMS TO BE INCLUDED IN A FEASIBILITY STUDY/REMEDIAL OPTIONS EVALUATION REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all feasibility studies/remedial option evaluation reports submitted to the Board. Reports must be signed by a registered geologists, certified engineering geologist, or civil engineer registered or certified by the State of California.

I. Purpose of Feasibility Study/Remedial Options Evaluation

II. Background
   - A. Description of Facility
   - B. Site History
     1. Years of Operation
     2. Chemical Use
     3. Chemical Releases (Potential and Documented)

C. Geology
   1. Regional
   2. Local, soil type, lithology, lateral extent of lithologic units

D. Hydrogeology
   1. Aquifers, Aquitards, Perched Aquifers
   2. Groundwater flow rates, directions, recharge, discharge
   3. Groundwater Use
   4. Extraction and injection wells affect on groundwater flow

E. Surface Water
   1. Losing or gaining streams, ponds etc.
   2. Hydraulic connection with aquifers

F. Local Land Use

G. Previous Investigation and Remedial Actions

II. Nature and Extent of Contamination

A. Contaminants in Soils
   1. Types and Concentrations
   2. Lateral and Vertical Extent

B. Contaminants in Groundwater
   1. Types and Concentrations
   2. Lateral and Vertical Extent (including Perched Zones)

III. Contaminant Fate and Transport

A. Contaminant Properties
   1. Mobility
   2. Toxicity
   3. Half-life
   4. Chemical and biological degradation

B. Contaminant Transport based on Soil and Aquifer Properties

IV. Remedial Action Objectives

V. Description of Remedial Action Alternatives

VI. Evaluation of Remedial Action Alternatives

A. Overall Protectiveness of Human Health and the Environment

B. Compliance with Laws and Regulations

C. Long Term Effectiveness and Permanence

D. Reduction of Toxicity, Mobility, and Volume

E. Short Term Effectiveness

F. Implementability

G. Cost

F. State and Community Acceptance

VII. Potential Impacts of Remedial Actions

VIII. Estimated Project Schedule for Each Alternative

IX. Preferred Alternative

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

MONITORING AND REPORTING
PROGRAM NO. R5-2002-0801
FOR
GOSS-JEWETT CORPORATION OF
NORTHERN CALIFORNIA, INC.
STEVE LAMANET, EDWARD ANSELMO,
AND JAMES KOTROUS
FORMER GOSS-JEWETT FACILITY
SACRAMENTO, SACRAMENTO COUNTY

Goss-Jewett Corporation of Northern California, Inc. (Goss-Jewett), Steve Lamanet, Edward Anselmo, and James Kotrous (hereafter collectively Discharger) own, owned, or operated at 4301 Power Inn Road, Sacramento (site; Attachment 1). James Kotrous currently owns the property, and Edward Anselmo owned the property from 1976 until October 1995. Goss-Jewett, with Steve Lamanet as vice president and general manager, operated on the northern part of the property for about 25 years as a dry cleaning chemical distribution facility. Groundwater at the site, which is about 60 feet below the ground surface, is polluted with tetrachloroethene (perchloroethylene; PCE), a dry cleaning solvent, and other volatile organic compounds (VOCs).

On 5 May 1997, Goss-Jewett installed a groundwater monitoring well (MW-1) approximately 20 feet southeast of a former aboveground storage tank (AGT) that was used to store PCE. The groundwater sample obtained from MW-1 contained 2,700 µg/l of PCE. In January 1998, Goss-Jewett installed groundwater monitoring well MW-2 about 50 feet northeast of the former AGT and groundwater/soil vapor monitoring well SVW-1A at the former AGT. Groundwater

samples obtained in January 1998 contained 8,100 µg/l (SVW-1A), 6,400 µg/l (MW-1), and 1,300 µg/l (MW-2) of PCE. No further sampling of the on-site wells has been conducted. PCE from Goss-Jewett has also been detected in a supply well at a private residence downgradient from the site and in supply and monitoring wells at Procter & Gamble (P&G), also downgradient from the site.

This Monitoring and Reporting Program (MRP) is issued pursuant to Section 13267 of the California Water Code and is necessary to delineate the groundwater contaminant plume and determine whether remediation efforts are effective. Existing data and information about the site shows the presence of various chemicals, including PCE and other VOCs, emanating from the property under the control of the Discharger and/or resulting from the Discharger's operation. The Discharger shall not implement any changes to this MRP unless and until a revised MRP is issued by the Executive Officer. This MRP replaces the requirements listed in MRP No. 5-01-842, which was issued on 30 November 2001.

Prior to construction of any new groundwater monitoring or extraction wells, the Discharger shall submit plans and specifications to the Board for review and approval. Once installed, all new wells shall be added to the monitoring program and shall be sampled and analyzed according to the schedule below.

GROUNDWATER MONITORING

As shown on Attachment 1, there are three groundwater monitoring wells on the site (MW-1 and SVW-1A) and adjacent property (MW-2). The groundwater monitoring program for the three monitoring wells, and any wells

installed subsequent to the issuance of this MRP shall follow the schedule below. Sample collection and analysis shall follow standard EPA protocol.

Constituents	EPA Analytical Method	Maximum Reporting Limit (µg/l)[1]	Sampling Frequency
Depth to Groundwater	–	–	Quarterly
Volatile Organic Compounds	8021B0 or 8260B	0.5	Quarterly

[1] For nondetectable results.

REPORTING

When reporting data, the Discharger shall arrange the information in tabular form so that the date, the constituents, and the concentrations are readily discernible. The data shall be summarized in such a manner as to illustrate clearly the compliance with this Order. If applicable, the Discharger shall notify the Board within 48 hours of any unscheduled shutdown of any soil vapor and/or groundwater extraction system.

As required by the California Business and Professions Code Sections 6735, 7835, and 7835.1, all reports shall be prepared by a registered professional or their subordinate and signed by the registered professional.

Quarterly reports shall be submitted to the Board by the **1st day of the second month following the end of each calendar quarter (i.e., by 1 February, 1 May, 1 August, and 1 November)** until such time as the Executive Officer determines that the reports are no longer

necessary. Each quarterly report shall include the following minimum information:

(a) a description of the quarterly groundwater sampling events, including field logs. At a minimum, field logs shall contain water quality parameters measured before, during, and after purging, method of purging, depth of water, volume of water purged, etc.;

(b) groundwater contour maps for all groundwater zones, if applicable;

(c) isocontour contaminant concentration maps for all monitored groundwater zones, if applicable;

(d) cumulative data tables containing the water quality analytical results and depth to groundwater;

(e) a copy of the laboratory analytical data report;

(f) if applicable, the status of any ongoing remediation, including cumulative information on the mass of contaminant removed from the subsurface, system operating time, the effectiveness of the remediation system, and any field notes pertaining to the operation and maintenance of the system; and

(g) if applicable, the reasons for and duration of all interruptions in the operation of any remediation system, and actions planned or taken to correct and prevent interruptions.

An annual report shall be submitted to the Board by **1 February** of each year. This report shall contain an evaluation of the effectiveness and progress of the investigation and remediation, and may be submitted with the fourth quarter monitoring report. The annual report shall contain the following minimum information:

(a) both tabular and graphical summaries of all data obtained during the previous year;

(b) groundwater contour maps and contaminant concentration maps containing all data obtained during the previous year;

(c) a discussion of the long-term trends in the concentrations of the pollutants in the groundwater monitoring wells;

(d) if applicable, an analysis of whether the contaminant plume is being captured by the extraction system or is continuing to spread;

(f) a description of all remedial activities conducted during the year, an analysis of their effectiveness in removing the contaminants, and plans to improve remediation system effectiveness;

(g) if applicable, the anticipated date for completion of cleanup or remediation activities;

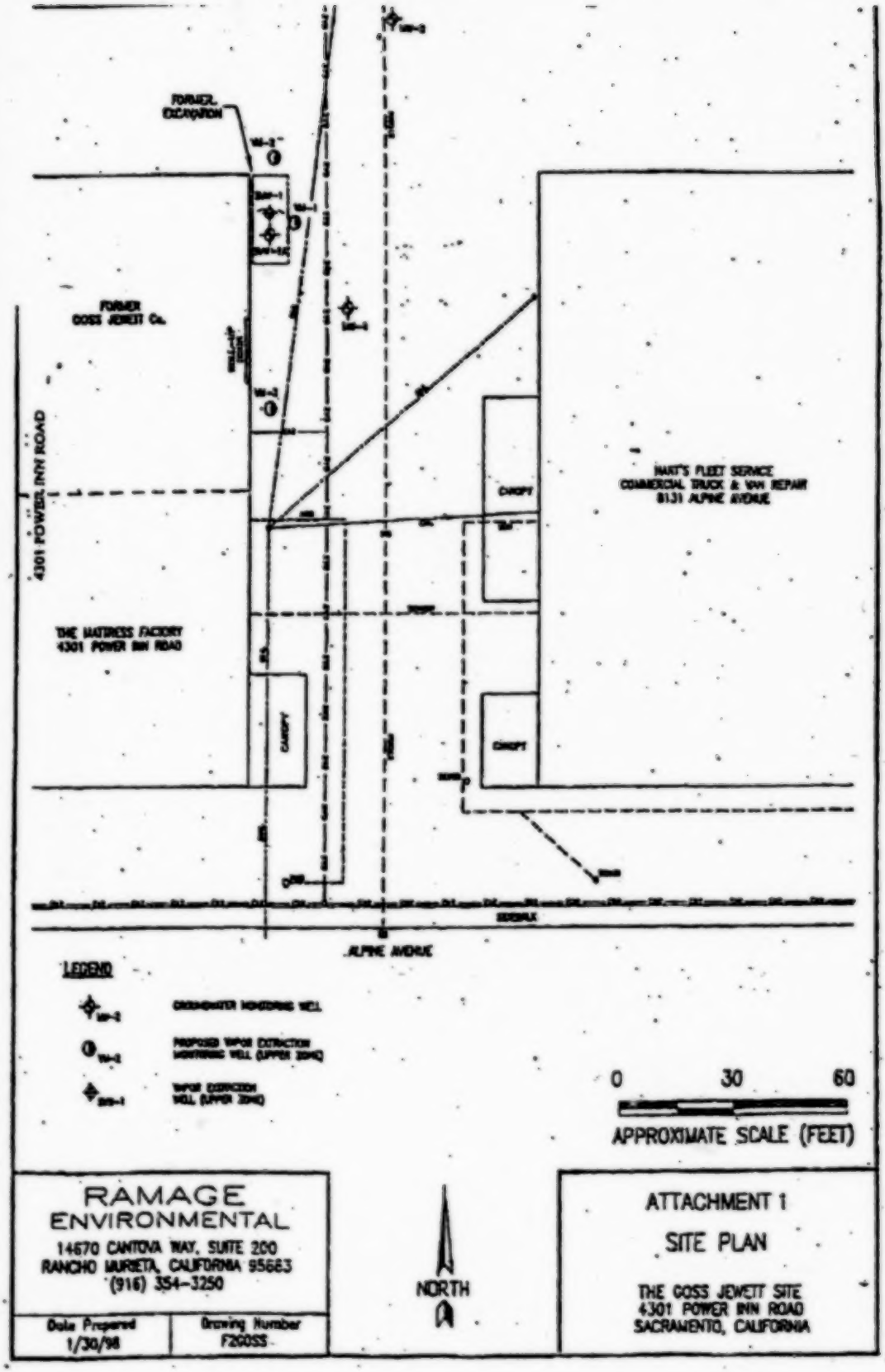
(h) an identification of any data gaps and potential deficiencies/redundancies in the monitoring system or reporting program;

(i) if desired, a proposal and rationale for any revisions to the groundwater sampling plan frequency and/or list of analytes.

The results of any monitoring done more frequently than required at the locations specified in the MRP also shall be reported to the Board. The Discharger shall implement the above monitoring program as of the date of the Order.

/s/ Gary M. Carlton
GARY M. CARLTON,
Executive Officer

8 FEB 2002
(Date)



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14670 CANTOVA WAY, SUITE 200
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Date Prepared	Drawing Number
1/30/98	FZGOSS

ATTACHMENT 1

SITE PLAN

THE GOSS JEWETT SITE
4301 POWER INN ROAD
SACRAMENTO, CALIFORNIA

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

Sacramento Main Office
Internet Address: http://www.swrcb.ca.gov/rwqcb5
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Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

17 June 2003

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Goss-Jewett Corp. of Northern California
and Mr. Steve Lamanet
c/o Mr. William Burns, Esq.
15720 Winchester Boulevard
Los Gatos, CA 95030

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Mr. James Kotrous
The Mattress Factory
4301 Power Inn Road
Sacramento, CA 95826

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7000 0520 0024 2571 3464

Mr. Steve Lamanet
3363 Kimberly Way
San Mateo, CA 94403

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7000 0520 0024 2571 3471

Mr. Edward Anselmo
770 Coronado Blvd
Sacramento, CA 95864

FINAL REVISED CLEANUP AND ABATEMENT ORDER NO. R5-2003-0702, GOSS-JEWETT CORPORATION FACILITY, SACRAMENTO, SACRAMENTO COUNTY

On 8 February 2002, the Executive Officer (EO) of the Central Valley Regional Water Quality Control Board (Regional Board) issued Cleanup and Abatement Order (CAO) No. R5-2002-0707, requiring investigation and cleanup of soil and groundwater at the former Goss-Jewett Corporation facility at 4301 Power Inn Road in Sacramento. At the same time, the EO issued Monitoring and Reporting Program (MRP) No. R5-2002-0801. Soil and groundwater beneath the site are polluted with tetrachloroethylene (PCE), with groundwater concentrations up to 12,000 ug/l.

Cleanup and Abatement Order No. R5-2002-0707 was issued to Goss-Jewett, Steve Lamanet, James Kotrous and Edward Anselmo. Mr. Anselmo has completed substantial work in compliance with this Order, and based on this work it is appropriate to revise the Order to provide a reasonable schedule to perform the necessary additional assessment and remedial work. The revised CAO names the same responsible parties (RPs) as CAO No. R5-2002-0707. MRP No. R5-2002-0801 remains in place and requires the four RPs to monitor the groundwater quarterly for constituents of concern.

Failure to comply with the provisions of the CAO and/or MRP could result in the Regional Board imposing civil liability, including liability up to one thousand dollars ($1,000) for each day that required technical reports are past due. If you have any questions regarding the CAO or MRP, or need additional information, please call Wendy Cohen at (916) 255-3075.

/s/ Thomas R. Pinkos
THOMAS R. PINKOS
Executive Officer

Attachments

cc: Regional Board Members
Ms. Frances McChesney, Office of Chief Counsel, SWRCB, Sacramento
Ms. Eileen Burke-Moody, Esq., Sacramento County District Attorney's Office, Sacramento
Mr. Dana Booth, Sacramento County Environmental Management Department, Sacramento
Mr. Robert Randall, Jr., Procter & Gamble, Sacramento
Mr. Jerry Fong, Carey & Carey, Palo Alto
Mr. David W. Calfee III, Esq., Calfee & Young, Woodland
Mr. Ijaz Jamall, Risk-Based Decisions, Inc., Sacramento
Mr. Michael E. Vergara, Somach, Simmons & Dunn Sacramento

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD CENTRAL VALLEY REGION

CLEANUP AND ABATEMENT
ORDER NO. R5-2003-0702
FOR
GOSS-JEWETT CORPORATION OF NORTHERN
CALIFORNIA, INC.,
STEVE LAMANET,
EDWARD ANSELMO,
AND JAMES KOTROUS
FORMER GOSS-JEWETT FACILITY
SACRAMENTO, SACRAMENTO COUNTY

This Order is issued to Goss-Jewett Corporation of Northern California, Inc. (Goss-Jewett), Steve Lamanet, Edward Anselmo, and James Kotrous based on provisions of California Water Code Section 13304, which authorizes the California Regional Water Quality Control Board, Central Valley Region (hereafter Regional Board) to issue a Cleanup and Abatement Order (Order). Goss-Jewett, Steve Lamanet, Edward Anselmo, and James Kotrous are hereafter collectively referred to as Discharger.

The Regional Board finds, with respect to the Discharger's acts or failure to act, the following:

INTRODUCTION

1. Goss-Jewett operated a tetrachloroethylene (PCE) distribution facility at 4301 Power Inn Road, Sacramento as shown in Attachment 1, which is made part of this Order.

2. The property is owned ~~by James~~ Kotrous, who purchased it in October 1995. From 1976 until October 1995, the property was owned by Edward Anselmo. Goss-Jewett operated on the northern part of the

property for about 25 years. Mr. Steve Lamanet was a vice president and the general manager of Goss-Jewett. Goss-Jewett leased the property from Edward Anselmo until October 1995. The existing lease continued until it expired in June 1996. The site is currently occupied by The Mattress Factory, a retail bedding store owned by Mr. Kotrous.

3. On 30 November 2001, the Executive Officer issued Cleanup and Abatement Order No. 5-01-714 to Goss-Jewett, Steve Lamanet, and James Kotrous. That Order stated Goss-Jewett and Mr. Lamanet were initially required to perform the work to achieve compliance, and if they failed to do so, Mr. Kotrous would be required to perform the work after notification by the Board and issuance of a revised Cleanup and Abatement Order. Neither Goss-Jewett nor Mr. Lamanet complied with Order No. 5-01-714.

4. On 8 February 2002, the Executive Officer issued Cleanup and Abatement Order No. R5-2002-0707 to Goss-Jewett, Steve Lamanet, James Kotrous and Edward Anselmo. Edward Anselmo has completed substantial work in compliance with this Order, and based on this work it is appropriate to revise the Order to provide an accurate and reasonable schedule to perform necessary additional site assessment and remedial work.

5. Edward Anselmo and James Kotrous are subject to this Order because, as the former and current owners of the property, respectively, they leased the property to Goss-Jewett and Steve Lamanet, had knowledge of the type of business Goss-Jewett was engaged in and permitted them to conduct activities that caused waste to be discharged or deposited where it discharged into waters of the state and created and threatens to create a condition of pollution or nuisance. In addition, James Kotrous, as the current

owner of the property, is a person who has caused or permitted waste to be discharged to waters of the state where it has created and threatens to create a condition of pollution or nuisance because he had knowledge of the discharge and the ability to control it, including the ongoing movement of the waste from the soil to the groundwater and the continued movement of the groundwater plume. Goss-Jewett and Steve Lamanet are subject to this Order because they conducted activities at the property that caused or permitted waste to be discharged or deposited where it discharged into waters of the state and has created and threatens to create a condition of pollution or nuisance. Mr. Lamanet was onsite during facility operations and was directly involved in those operations.

BACKGROUND

6. On 4 January 1996, Sacramento County Environmental Management Department (Sacramento County) and the City of Sacramento, Division of Hazardous Materials (City) inspected the site and observed approximately 100 55-gallon containers in various stages of degradation. They also observed an aboveground storage tank (AGT) that contained tetrachloroethene (PCE). The PCE dispenser did not have a nozzle and, according to the Sacramento County incident report, "it appeared that there was a lot of perc [PCE] that had leaked into the soil." A near surface soil sample obtained near the PCE dispenser contained 300 ppm of PCE.

7. The AGT was removed at an unknown time in 1996. During August 1996, Goss-Jewett obtained a soil sample from 6.5 feet below the ground surface (bgs) at the site of the AGT, winch contained 340 ppm of PCE. Sacramento County assumed lead regulatory agency

status for the environmental cleanup after the soil excavation was completed.

8. Between December 1997 and June 1998, Goss-Jewett conducted investigations which included installation of a soil vapor extraction well and two groundwater monitoring wells. The viability of a soil vapor extraction system was not adequately assessed, but the investigations found groundwater contained up to 8,100 µg/l of PCE.

9. Based on the results of the groundwater investigation, Sacramento County required Goss-Jewett to conduct a well survey. The well survey records showed that 35 wells had been drilled within 2,000 feet of the site, including a private well used for domestic supply within 500 feet south and downgradient from the site. Goss-Jewett subsequently sampled that well on 22 June 1998 and it contained 754 µg/l of PCE. The well was removed from service and municipal water was supplied the day the results were released to Sacramento County. Goss-Jewett has not conducted additional environmental investigation/ remediation since the domestic well was sampled.

10. In a letter dated 28 September 1999, Sacramento County requested that the Regional Board assume lead regulatory agency status for the environmental cleanup at the site. At the time of the request, the Sacramento County District Attorney was pursuing criminal charges against Goss-Jewett and Mr. Steve Lamanet for hazardous waste handling and storage violations.

11. On 20 January 2000, the District Attorney negotiated separate plea agreements with Goss-Jewett, which included a $100,000 fine and probation, and Mr. Lamanet, which included a $25,000 fine and probation.

12. In 2000, Regional Board staff sent several letters to Goss-Jewett and Mr. Lamanet requiring work plans for site investigation and cleanup. Neither Goss-Jewett nor Mr. Lamanet submitted any of the required items.

13. Following issuance of Cleanup and Abatement Order No. R5-2002-0707, on 2 May 2002, Edward Anselmo signed the Acknowledgment of Receipt of Oversight Cost Reimbursement Account Letter in which he agreed to pay Regional Board staff costs for oversight of the cleanup and abatement.

14. On 26 August 2002, Risk-Based Decisions, Inc., (RBDI) an environmental consulting firm, submitted a *Preliminary Site Assessment Report* on behalf of Edward Anselmo with the results of a soil gas survey conducted in the area surrounding the former AGT and groundwater samples collected from the existing monitoring wells and downgradient domestic wells. They found up to 13,000 µg/l PCE in the soil vapor at a depth of 20 feet, and up to 17,000 µg/l PCE in an on-site monitoring well. Two industrial water supply wells used by the Pavestone Company at 4751 Power Inn Road, 1,200 feet downgradient of the Goss-Jewett facility, contained up to 6.4 µg/l. A well used for cooling water at the Proctor & Gamble facility about 2,800 feet downgradient had 9.2 µg/l PCE.

15. On 10 October 2002, RBDI submitted a preliminary *Feasibility Study/Remedial Options Evaluation Report* in which they recommended installing a soil vapor extraction (SVE) system as an interim remedial measure.

16. On 5 February 2003, RBDI submitted the *4th Quarter/Annual 2002 Groundwater Monitoring Report*, in which they reported that groundwater in on-site monitoring wells contained up to 7,800 µg/L PCE.

RBDI excavated about 20 cubic yards of soil from beneath the site of the former AGT, which has been shipped to a hazardous waste incinerator in Nevada.

17. During the 1st quarter of 2003, RBDI installed a SVE system. The SVE system started operating on 26 March 2003, and has been removing approximately 13 pounds of PCE per day. By the end of April 2003, the SVE system removed approximately 865 pounds of PCE.

18. On 9 April 2003, RBDI submitted a *Final Site Assessment Report* with the results of nine additional grab groundwater and monitoring well samples which attempted to define the lateral extent of the PCE groundwater plume. RBDI discovered a water supply well at the Rental Service Corporation, 4635 Power Inn Road, that was not included in the well survey. They found the well contained 24 µg/l PCE. RBDI also installed an upgradient monitoring well that contained 19 µg/l PCE. Additional site assessment work will be required to define the lateral and vertical extent of the plume and to confirm the presence of upgradient pollution.

AUTHORITY – LEGAL REQUIREMENTS

19. The Regional Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins 4th Edition* (hereafter Basin Plan) designates beneficial uses of the waters of the State, establishes water quality objectives (WQOs) to protect these uses, and establishes implementation policies to implement WQOs. The beneficial uses of the groundwater beneath the site are domestic, municipal, industrial, and agricultural supply.

20. PCE is a refined hydrocarbon product, is not naturally-occurring, and is a known human carcinogen.

Pollution of groundwater with elevated concentrations of PCE impairs the beneficial uses of the groundwater.

21. WQOs listed in the Basin Plan include numeric WQOs, e.g., state drinking water maximum contaminant levels (MCLs) that are incorporated by reference, and narrative WQOs, including the narrative toxicity objective and the narrative tastes and odors objective for surface and groundwater. Chapter IV of the Basin Plan contains the *Policy for Application of Water Quality Objectives*, which provides that "[w]here compliance with narrative objectives is required (i.e., where the objectives are applicable to protect specified beneficial uses), the Regional Water Board will, on a case-by-case basis, adopt numerical limitations in orders which will implement the narrative objectives." The numerical limit for the constituent of concern listed in the following table implements the Basin Plan WQOs.

Constituent	Limits	WQO	Reference
PCE	0.06 µg/l	Narrative Toxicity	California Public Health Goal in Drinking Water – Office of Environmental Health Hazard Assessment

µg/l Micrograms per liter

22. The constituents listed in Finding No. 21 are wastes as defined in California Water Code Section 13050.

23. The groundwater exceeds the WQOs for the constituents listed in Finding No. 21. The exceedance of applicable WQOs in the Basin Plan constitutes pollution as defined in California Water Code Section 13050. The Discharger has caused or permitted waste to be discharged or deposited where it has discharged to waters of the state and has created, and continues to

threaten to create, a condition of pollution or nuisance.

24. The State Water Resources Control Board (hereafter State Board) has adopted Resolution No. 92-49, the *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304*. This Policy sets forth the policies and procedures to be used during an investigation or cleanup of a polluted site and requires that cleanup levels be consistent with State Board Resolution 68-16, the *Statement of Policy With Respect to Maintaining High Quality of Waters in California*. Resolution 92-49 and the Basin Plan establish the cleanup levels to be achieved. Resolution 92-49 requires the waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with Title 23, California Code of Regulations (CCR) Section 2550.4. Any alternative cleanup level to background must (1) be consistent with the maximum benefit to the people of the state; (2) not unreasonably affect present and anticipated beneficial use of such water, and (3) not result in water quality less than that prescribed in the Basin Plan and applicable Water Quality Control Plans and Policies of the State and Regional Boards.

25. Chapter IV of the Basin Plan contains the *Policy for Investigation and Cleanup of Contaminated Sites*, which describes the Regional Board's strategy for managing contaminated sites. This strategy is based on Water Code Sections 13000 and 13304, the Title 27, Division 2, Subdivision 1 regulations and State Water Board Resolution Nos. 68-16 and 92-49. The strategy includes site investigation, source removal or containment information required to be submitted for consideration in establishing cleanup levels, and the

bases for establishment of soil and groundwater cleanup levels.

26. The State Board adopted the *Water Quality Enforcement Policy*, which states in part: "At a minimum, cleanup levels must be sufficiently stringent to fully support beneficial uses, unless the RWQCB allows a containment zone. In the interim, and if restoration of background water quality cannot be achieved, the CAO should require the discharger(s) to abate the effects of the discharge. Abatement activities may include the provision of alternate water supplies." (Enforcement Policy, p. 19.)

27. Section 13304(a) of the California Water Code provides that:

"Any person who has discharged or discharges waste into waters of the state in violation of any waste discharge requirements or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts. Upon failure of any person to comply with the cleanup or abatement order, the Attorney General, at the request of the Regional Board, shall petition the superior court for that county for the issuance of an injunction requiring the person to comply with the order. In the suit, the court shall have jurisdiction to grant a prohibitory or mandatory injunction, either preliminary or permanent, as the facts may warrant."

28. Section 13267(b) of the California Water Code provides that:

"In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region, or any citizen or domiciliary, or political agency or entity of this state who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge, waste outside of its region that could affect the quality of waters within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports."

The technical reports required by this Order are necessary to assure compliance with Section 13304 of the California Water Code. Existing data and information about the site indicates that waste has been discharged or is discharging at the property, which is or was owned or operated by the Dischargers named in this Order.

29. Section 13304(c)(1) of the California Water Code provides that:

" . . . the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste within the meaning of subdivision (a), are liable to that government agency

to the extent of the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities, or taking other remedial actions . . . "

30. If the Discharger fails to comply with this Order, the Executive Officer may request the Attorney General to petition the superior court for the issuance of an injunction.

31. If the Discharger intentionally or negligently violates this Order, then the Discharger may be liable civilly in a monetary amount provided by the California Water Code.

32. The issuance of this Order is an enforcement action taken by a regulatory agency and is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000, et seq.), pursuant to Title 14 CCR Section 15321(a)(2). The implementation of this Order is also an action to assure the restoration of the environment and is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000, et seq.), in accordance with Title 14 CCR, Sections 15308 and 15330.

33. Any person affected by this action of the Regional Board may petition the State Board to review the action in accordance with Title 23 CCR Sections 2050-2068. The regulations may be provided upon request and are available at www.swrcb.ca.gov. The State Board must receive the petition within 30 days of the date of this Order.

REQUIRED ACTIONS

IT IS HEREBY ORDERED that Cleanup and Abatement Order No. R5-2002-0707 is rescinded, and pursuant to

California Water Code Section 13304 and Section 13267, Goss-Jewett Corporation of Northern California Inc., Steve Lamanet, Edward Anselmo, and James Kotrous shall:

1. Investigate the discharges of waste, clean up the waste, and abate the effects of the waste, forthwith, resulting from activities at the former Goss-Jewett facility at 4301 Power Inn Road, Sacramento, in conformance with State Board Resolution No. 92-49 *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304* and with the Regional Board's *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins* (in particular the Policies and Plans listed within the Control Action Considerations portion of Chapter IV). "Forthwith" means as soon as is reasonably possible. Compliance with this requirement shall include, but not be limited to, completing the tasks listed below.

SITE ASSESSMENT

2. Within 30 days of staff concurrence with the 23 May 2003 *Workplan for Additional Site Assessment, 4301 Power Inn Road Sacramento, California*, implement the work plan and submit an *Additional Site Assessment Report*, which contains the information in Attachment 3, in accordance with the approved time schedule, which shall become part of this Order, and include recommendations and a work plan for additional investigation, if needed. The work plan for additional investigation shall contain information in Attachment 2, including a sufficient number of sampling points and wells to determine the vertical and lateral extent of pollutants.

FEASIBILITY STUDY AND CLEANUP

3. By 15 October 2003, submit a *Feasibility Study/ Remedial Options Evaluation Report* for soil and groundwater cleanup. The report shall contain the information in Attachment 4, which is made part of this Order. The proposed preferred alternative for groundwater must meet the range of cleanup levels as described in the Basin Plan and Resolution No. 92-49. The Discharger shall attempt to clean up each constituent to background concentrations, or to the level that is technically and economically feasible and at least achieves the Water Quality Objectives of the Basin Plan.

4. Within **60 days** of staff concurrence with the *Feasibility Study/Remedial Options Evaluation Report* for soil and groundwater cleanup, submit a *Cleanup Plan*, which describes the preferred alternative(s) for cleanup and includes a time schedule to conduct the cleanup activities. The approved time schedule to implement the cleanup shall become a part of this Order.

5. Within **60 days** of Executive Officer approval of the *Cleanup Plan* for soil and groundwater, commence cleanup or installation of the cleanup system. The Discharger shall notify staff a minimum of 72 hours prior to beginning field work.

6. Within **120 days** of Executive Officer approval of the *Cleanup Plan*, submit a report describing the status and results of the cleanup work (*Cleanup Implementation Report*). The report shall clearly show whether the installation of any cleanup system is complete, and if not, give a schedule and proposed work plan for installation of the remaining cleanup activities, including a proposed monitoring plan.

GROUNDWATER MONITORING

7. Conduct monitoring of the existing wells and any additional wells in accordance with MRP No. R5-2002-0801 or any revised MRP issued by the Executive Officer.

GENERAL REQUIREMENTS

8. Continue to reimburse the Regional Board for reasonable costs associated with oversight of the cleanup of this facility. Failure to do so shall be considered a violation of this Order.

9. Conduct work only after work plans are concurred with by Regional Board staff.

10. Submit all reports with a cover letter from the Discharger.

11. Seven days prior to conducting any field work, submit a Health and Safety Plan that is adequate to ensure worker and public safety during the field activities in accordance with CCR Title 8, Section 5192.

12. As required by the California Business and Professions Code Sections 6735, 7835, and 7835.1, have all reports prepared by, or under the supervision of, a registered professional engineer or geologist and signed by the registered professional. All technical reports submitted by the Discharger shall include a statement signed by the authorized representative certifying under penalty of law that the representative has examined and is familiar with the report and that to his knowledge, the report is true, complete, and accurate.

13. Upon startup of any remediation system(s), operate the remediation system(s) continuously, except for periodic and required maintenance or unpreventable

equipment failure. The Discharger shall notify the Regional Board within 24 hours of any unscheduled shutdown of the remediation system(s) that lasts longer than 48 hours. This notification shall include the cause of the shutdown and the corrective potion taken (or proposed to be taken) to restart the system. Any interruptions in the operation of the remediation system(s), other than for maintenance, emergencies, equipment failure, or requirements of other applicable regulatory agencies, without prior approval from Regional Board staff or without notifying the Regional Board within the specified time is a violation of this Order.

14. Optimize remedial systems as needed to improve system efficiency, operating time and/or pollutant removal rates, and report on the effectiveness of the optimization in the Annual Report.

15. Notify Regional Board staff at least three working days prior to any onsite work, testing, or sampling that pertains to environmental remediation and investigation and is not routine monitoring, maintenance, or inspection.

16. Obtain all local and state permits and access agreements necessary to fulfill the requirements of this Order prior to beginning the work.

17. Continue any remediation or monitoring activities until such time as the Executive Officer determines that sufficient cleanup has been accomplished to fully comply with this Order and this Order has been rescinded.

18. If, for any reason, the Discharger is unable to perform any activity or submit any document in compliance with the schedule set forth herein; or in compliance with any work schedule submitted pursuant to this

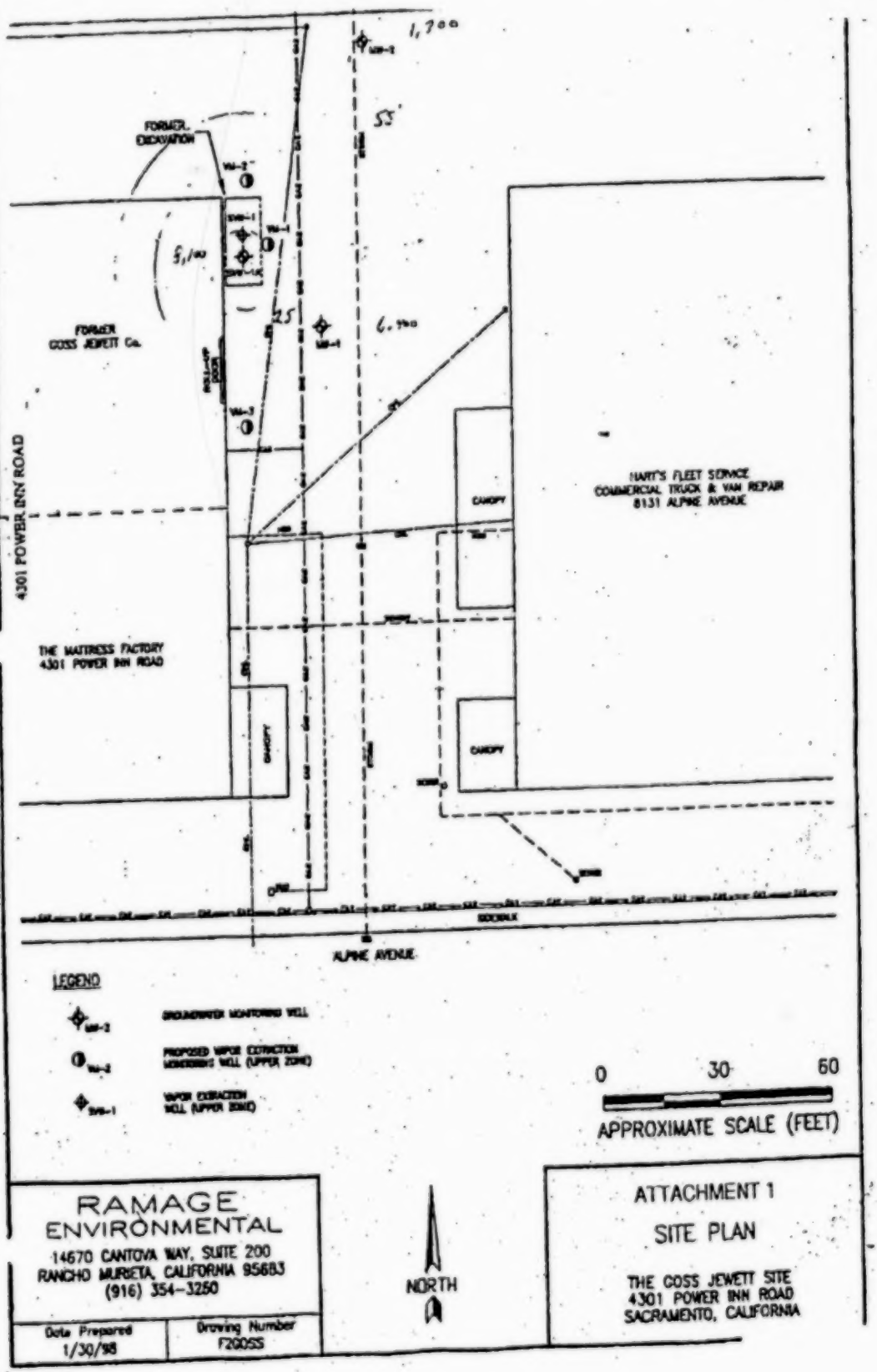
Order and approved by the Executive Officer, the Discharger may request, in writing, an extension of the time specified. The extension request shall include justification for the delay. An extension may be granted by revision of this Order or by a letter from the Executive Officer.

19. If, in the opinion of the Executive Officer, the Discharger fails to comply with the provisions of this Order, the Executive Officer may refer this matter to the Attorney General for judicial enforcement or may issue a complaint for administrative civil liability.

This Order is effective upon the date of signature.

/s/ Thomas R. Pinkos
THOMAS R. PINKOS,
Executive Officer

17 June 2003
(Date)



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Date Prepared	Drawing Number
1/30/98	F2GOSS

ATTACHMENT 1

SITE PLAN

THE GOSS JEWETT SITE
4301 POWER INN ROAD
SACRAMENTO, CALIFORNIA

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

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[LOGO]
Winston H. Hickox
Secretary for Environmental Protection

[SEAL]
Gray Davis
Governor

17 June 2003

ATTACHMENT 2

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT WORK PLAN

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment work plans submitted to the Board. All work plans must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. BACKGROUND

A. *Site History*

State all operations conducted at the site.

Identify present and historical chemical usage and handling procedures.

List all chemical spills and their disposition.

Identify all past and present above ground and under ground tank locations.

Identify tank capacities and other specifications as necessary.

Identify tank contents, past and present.
Submit all records of tests or repairs on fuel lines and tanks.
Identify locations of maintenance shops, chemicals used in the shops, method of chemical storage and disposal.

B. *Topographic map of site vicinity showing:*
All natural and man-made drainage features including ditches and surface impoundments, and the drainages destination;
Utilities, especially storm drain system;
Location of existing monitoring wells, including those installed by other parties;
Location of above ground and underground storage tanks, other waste-handling facilities, and/or spill site;
Location of a major body of water relative to the site;
Location of any nearby private, municipal, or irrigation wells; and
Other major physical and man-made features.

C. *Geology/Hydrogeology*
Include proposal for logging of boreholes and characterizing site geology, and identifying unconfined or confined aquifers and contaminant flowpaths.

II. PREVIOUS SITE ASSESSMENTS

Provide a detailed description of any previous site assessment conducted to determine if there is any soil or ground water contamination. Include analytical results of all soil and water samples analyzed, and water level and floating product measurements.

III. FIELD INVESTIGATION

A. *General*
Monitoring well locations and rationale
Survey details
Equipment decontamination procedures
Health and safety plan

B. *Drilling Details*
Describe drilling and logging methods

C. *Monitoring Well Design*
Casing diameter
Borehole diameter
Depth of surface seal
Well construction materials
Diagram of well construction
Type of well cap
Size of perforations and rationale
Grain size of sand pack and rationale
Thickness and position of bentonite seal and sand pack
Depth of well, length and position of perforated interval

D. *Well Development*
Method of development to be used
Method of determining when development is complete
Method of development water disposal

E. *Soil Sampling*
Cuttings disposal method
Analyses to be run and methods
Sample collection and preservation method
Intervals at which soil samples are to be collected
Number of soil samples to be analyzed and rationale
Location of soil samples and rationale
QA/QC procedures

F. *Well Sampling*

Minimum time after development before sampling (48 hours)

Well purging method and amount of purge water

Sample collection and preservation method

QA/QC procedures

G. *Water Level Measurement*

Elevation reference point at each monitoring well shall be within 0.01 foot. Ground surface elevation of each monitoring well shall be within .01 foot. Method and time of water level measurement shall be specified.

IV. QA/QC PROCEDURES

Specify number of field blanks and duplicates.

V. TIME SCHEDULE FOR PROPOSED WORK

The work plan shall include a time schedule for implementation of work.

California Regional Water Quality Control Board
Central Valley Region
Robert Schneider, Chair

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Secretary for Environmental Protection

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Gray Davis
Governor

17 June 2003

ATTACHMENT 3

ITEMS TO BE INCLUDED IN A SITE ASSESSMENT REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all site assessment reports submitted to the Board. Other supporting data to be included in the report, either within the text of the report or in appendices, are italicized at the end of each section. All reports must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the State of California. Other pertinent information specific to each individual investigation also should be included.

I. INTRODUCTION

Summary of past investigations
Purpose of the recent investigation
Scope of the recent investigation
Time period in which the recent investigation was carried out

II. SUMMARY

Number of wells drilled
Results of soil and water analyses
Ground water flow direction and gradient
Possible source determination

III. FIELD INVESTIGATION

Well Construction

Number and depth of wells drilled
Date(s) wells drilled
Description of drilling and construction
Approximate locations relative to facility site(s)

Supporting Date:

A well construction diagram for each well should be included in the report which shows the following details:

Total depth drilled
Depth of open hole (same as total depth drilled if no caving occurs)
Footage of hole collapsed
Length of slotted casing installed
Depth of bottom of casing
Depth to top of sand pack
Thickness of sand pack
Depth to top of bentonite seal
Thickness of bentonite seal
Thickness of concrete grout
Boring diameter
Casing diameter
Casing material
Size of perforations
Number of bags of sand
Well elevation at top of casing
Depth to ground water
Date of water level measurement
Monitoring well number
Date drilled
Location

Well Development

Date(s) of development of each well
Method of development
Volume of water purged from well
How well development completion was determined
Method of effluent disposal

Supporting Date:

Field notes from well development should be included in report.

Water Sampling

Date(s) of sampling
How well was purged
How many well volumes purged
Levels of temperature, EC, and pH at stabilization
Sample collection, handling, and preservation methods
Sample identification
Analytical methods used

Soil Sampling

Date(s) of sampling
Sample collection, handling, and preservation method
Sample identification
Analytical methods used

IV. FINDINGS OF THE INVESTIGATION

Lithology

Types of sediments encountered
Presence, location, and lateral continuity of any significant sand, silt, or clay layers
Any visual signs of contamination

Supporting Date:

Well logs geologic cross-sections should be included in the report.

Analytical Results of Soil and Ground Water Sampling

Analytical results of each monitoring well should be summarized

Supporting Data:

Laboratory analytical sheets
Chain-of-custody forms

Water Levels

Static water levels measured when well drilled
Date(s) of water level measurements
Water levels determined prior to sampling

Supporting Date:

Dates of water level measurement, depths to ground water, and ground water elevations should be tabulated and included in the report.

Ground Water Gradient and Flow Direction

Ground water gradient and flow direction determined by the investigation should be discussed and compared to the regional gradient and flow direction.

Supporting Date:

A ground water contour map, drawn to scale, should be provided which shows each well, its ground water elevation, and lines of equal ground water elevation. Ground water gradient and flow direction should be shown on the map. The calculation of the gradient should be included.

V. RESULTS OF QA/QC

QA/QC procedures
QC sample identification
Field blank analyses
Comparison of duplication sample results

VI. CONCLUSIONS AND RECOMMENDATIONS

Note any contamination found
Identify any suspected source of contamination, if possible
Recommend any further investigative needs

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ATTACHMENT 4

ITEMS TO BE INCLUDED IN A FEASIBILITY STUDY/REMEDIAL OPTIONS EVALUATION REPORT

The outline below is a minimum requirement for items to be included and discussed in the text of all feasibility studies/remedial option evaluation reports submitted to the Board. Reports must be signed by a registered geologist, certified engineering geologist, or civil engineer registered or certified by the state of California.

I. Purpose of Feasibility Study/Remedial Options Evaluation

II. Background
  A. Description of Facility
  B. Site History
    1. Years of Operation
    2. Chemical Use
    3. Chemical Releases (Potential and Documented)

C. Geology
   1. Regional
   2. Local, soil type, lithology, lateral extent of lithologic units

D. Hydrogeology
   1. Aquifers, Aquitards, Perched Aquifers
   2. Groundwater flow rates, directions, recharge, discharge
   3. Groundwater use
   4. Extraction and injection wells affect on groundwater flow

E. Surface Water
   1. Losing or gaining streams, ponds etc.
   2. Hydraulic connection with aquifers

F. Local Land Use

G. Previous Investigation and Remedial Actions

II. Nature and Extent of Contamination

A. Contaminants in Soils
   1. Types and Concentrations
   2. Lateral and Vertical Extent

B. Pollutants in Groundwater
   1. Types and Concentrations
   2. Lateral and Vertical Extent (including Perched Zones)

III. Contaminant Fate and Transport

A. Contaminant Properties
   1. Mobility
   2. Toxicity
   3. Half-life
   4. Chemical and biological degradation

B. Contaminant Transport based on Soil and Aquifer Properties

IV. Remedial Action Objectives

V. Description of Remedial Action Alternatives – at a minimum, 3 alternatives must be considered

A. Alternative that meets background levels

B. Alternative that meets water quality objectives
C. Alternative that meets levels between background and water quality objectives

VI. Evaluation of Remedial Action Alternatives
A. Overall Protectiveness of Human Health and the Environment
B. Compliance with Laws and Regulations
C. Long Term Effectiveness and Permanence
D. Reduction of Toxicity, Mobility, and Volume
E. Short Term Effectiveness
F. Implementability
G. Cost
F. State and Community Acceptance

VII. Potential Impacts of Remedial Actions

VIII. Estimated Project Schedule for Each Alternative

IX. Preferred Alternative